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IN THE

Supreme Court of the United States

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SUPREME COURT, U. S.

October Term, 1965

CRAWFORD COUNTY BAR ASSOCIATION, FINES F. BATCHELOR, JR., PRESIDENT, DAVID O. PARTAIN, VICE-PRESIDENT and N. D. EDWARDS, SECRETARY-TREASURER: and CECIL L. ALEXANDER ..... *Appellants,*

v.

ORVAL E. FAUBUS, GOVERNOR, KELLY BRYANT, SECRETARY OF STATE and BRUCE BENNETT, ATTORNEY GENERAL, as THE BOARD OF APPORTIONMENT of the STATE OF ARKANSAS ..... *Appellees*

On Appeal From the United States District Court for the Eastern District of Arkansas

JURISDICTIONAL STATEMENT
APPELLANT CRAWFORD COUNTY BAR ASSOCIATION

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CRAWFORD COUNTY BAR ASSOCIATION, BY FINES F. BATCHELOR, JR., PRESIDENT, DAVID O. PARTAIN, VICE-PRESIDENT and N. D. EDWARDS, SECRETARY-TREASURER: and CECIL L. ALEXANDER ..... *Appellants,*

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On Appeal From the United States District Court for the Eastern District of Arkansas

JURISDICTIONAL STATEMENT APPELLANT CRAWFORD COUNTY BAR ASSOCIATION

This is an appeal by Crawford County Bar Association ~~and Cecil L. Alexander~~ from the judgment and opinion of the United States District Court for the Eastern District of Arkansas, entered on November 4, 1965, while setting as a Three-judge Statutory Court especially invoked by the provisions of 28 U.S.C.A. Section 2281. This state is submitted by Appellants, Crawford County Bar Association, to show that the Supreme Court of the United States has jurisdiction

of the appeal and that a substantial Federal question is presented.

OPINIONS BELOW

The United States District Court for the Eastern District of Arkansas, Western Division, on January 28, 1965, entered its Decree and Memorandum Opinion holding that portion of Amendment 45 to the Arkansas Constitution setting up Legislative Districts for both Houses of the Arkansas Legislature was unconstitutional and void, and issued mandatory injunction requiring Redistricting both Houses of the Arkansas Legislature in accordance with the 14th Amendment to the United States Constitution, which opinion is reported in 283 F. Supp. 290, and no appeal was taken from such judgment, the opinion being attached to this Statement as Appendix A, infra at page 1a, and the judgment of this Court with reference thereto is attached to this Statement as Appendix B, infra at page 25a. The opinion of the District Court approving the plan for Redistricting both Houses of the Arkansas Legislature submitted by the Board of Apportionment is not reported, this opinion is attached to this Statement as Appendix C, infra at page 27a, and contains as a part thereof, the Redistricting plan approved by the District Court, and the judgment of the Court with reference to such opinion is attached to this Statement as Appendix D, infra at page 42a.

JURISDICTION

This suit was brought attacking a portion of Amendment 45 to the Arkansas Constitution, requesting restraining order to prevent holding of elections under this unconstitutional provision and for man-

datory injunction to require the Redistricting of both Houses of the Arkansas Legislature in accordance with the 14th Amendment to the United States Constitution, the suit having been brought under 42 U.S.C.A. Sections 1983 and 1988; under 28 U.S.C.A. Sections 1343 (3) and 1343 (4); and under 28 U.S.C.A. Sections 2201 and 2202, and in accordance with the provisions of 28 U.S.C.A. Sections 2281 and 2284, a Three-judge District Court was ordered.

On January 28, 1965, the Three-judge District Court issued its judgment declaring the attacked portion of Amendment 45 to the Arkansas Constitution invalid and violative of the United States Constitution, granting mandatory injunction directing Board of Apportionment to formulate and file with the Court plan of Districting both Houses of the Arkansas Legislature in accordance with Amendment 14 to the United States Constitution, and no appeal was taken therefrom.

Within the time designated by the Court, as extended, the Board of Apportionment filed with the Court a plan of Districting both Houses of the Arkansas Legislature, to which plan appellants objected and with leave of Court filed interventions wherein it was alleged that the Board of Apportionment had not complied with the mandatory injunction of the District Court or with the 14th Amendment to the United States Constitution in its Districting Plan, praying injunctive and other relief. The Three-judge District Court entered its judgment and rendered its memorandum opinion herein on November 4, 1965, denying relief prayed by appellants and holding that the Districting plan filed by the Board of Apportionment was

valid and constitutional under Fourteenth Amendment to the United States Constitution, and Notice of Appeal to this Court was filed on November 26, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A. Section 1253, and the following are representative cases which sustain the jurisdiction of the Supreme Court to review this judgment on appeal:

Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362; *Lucas v. Colorado General Assembly,* 377 U.S. 713, 12 L. Ed 2d 632, 84 S. Ct. 1472; *Roman v. Sincock,* 377 U.S., 12 L.Ed. 2d 620, 84 S. Ct. 1462; *Maryland Committee for Fair Representation v. Tawes,* 377 U.S. 656, 12 L.Ed. 2d 595, 84 S. Ct. 1443; *WMCA, Inc. v. Lomenzo,* 377 U.S. 633, 12 L.Ed. 2d 568, 84 S. Ct. 1418; *Davis v. Mann,* 377 U.S. 678, 12 L.Ed. 2d 609, 84 S. Ct. 1453.

QUESTIONS PRESENTED

The State of Arkansas has been districted so that both Houses of its bicameral legislature have some one county, one member districts; some one county, multi-member districts; some multi-county, one member districts; and some multi-county, multi-member districts, and in several instances a county, or counties, with more population than the one-county, one-member districts, have been placed in districts with much larger counties, with no safeguard to insure either an effective vote, or a right to elect one of its number to the State Legislature. This practice is questioned as being violative of the 14th Amendment to the United States Constitution.

The districts of both Houses of the Legislature

set up by the Arkansas Board of Apportionment, and approved by the District Court formed on the basis that no county should be divided in the formation of districts, that the districts be formed of one or more contiguous counties, and that in setting up the districts they would be Constitutional so long as the variance from the ideal population did not exceed 15 percent either above or below, but that any variance which would exceed 15 percent either above or below the ideal population per member would be unconstitutional under any and all circumstances, and but for such assumption, Crawford County, Arkanssa, which had a population variance of 19 percent over the population of the ideal per member unit, would have been set up as a one-county, one-member district in the Arkansas House of Representative, and various other districts probably would have been set up differently but for the Board's assumption as to requirements of the United States Constitution, and appellants question both the assumption of the Board of Apportionment, and its actions based upon these assumptions which we respectfully submit are fallacious.

As an aid to both the Arkansas Board of Apportionment and the Courts, appellants, while being interested only in having constitutional rights of themselves and others similarly situated, have suggested two possible plans of Redistricting, one being the setting up of the State of Arkansas into 100 one-member units, with reference to the Arkansas House of Representatives, each unit containing approximately 17,860 inhabitants. The other suggested plan would provide for, as nearly as possible, setting the state up on the basis of counties, providing one representative to each county for each member that its population entitles it to, and them

granting to those counties, and where necessary districts, whose fractional population more nearly entitles it to an additional representative, forming counties which have too little population to entitle them to a representative of their own, into multi-county, one-member units with no less total population than the population entitling other counties to a representative, or to an additional representative. Since the Board of Apportionment has questioned the validity of the above proposed plans would be of valuable aid not only to those redistricting the State of Arkansas, but also other states complying with the United States Constitution.

STATUTES INVOLVED

This appeal does not question the validity of any statute or treaty, but does involve Amendment 45 to the Arkansas Constitution and action thereunder.

STATEMENT OF THE CASE

This action was originally brought July 15, 1964, by the plaintiff, Yancey, against the Governor, Secretary of State and Attorney General of the State of Arkansas, in their official capacity as "The Board of Apportionment" created under Amendment 45 to the Arkansas Constitution, attacking the validity of the portion of this Amendment which provided for apportionment of members of both Houses of the State Legislature, and prayed both for declaration of invalidity of the questions portion of the Arkansas Amendment and injunction against apportionment with respect to such invalid amendment, together with prayer for mandatory injunction to require redistricting or reapportionment of the State of Arkansas in accordance with the United States Constitution, Yancey alleging

therein that he was a resident of and was domiciled in Pulaski County, Arkansas, and brought this action upon behalf of himself and as a class action.

The Three-judge District Court held, based upon stipulations and pre-trial proceedings, that the questioned portion of the Arkansas Constitution violated the provisions of Amendment 14 to the United States Constitution and were, therefore, invalid, and issued its mandatory injunction requiring the Board of Apportionment to redistrict both Houses of the Legislature of Arkansas in accordance with the 14th Amendment to the United States Constitution, the new apportionment to be effective not later than the November election of 1964.

The Arkansas Supreme Court in the case of *Faubus v. Kinney,* 239 Ark. 443, 389 SW2d 887 (1965) held that Amendment 45 was severable and the invalidity of the portion which was violative of the United States Constitution did not invalidate the remainder of the Amendment.

July 15, 1965, within the time provided by the Three-judge District Court, as extended, the Board of Apportionment filed proposed Redistricting plan for both Houses of the Arkansas Legislature, to which plaintiff objected and appellants, with leave of the Court, filed interventions objecting to the Reapportionment plan filed, alleging it to be violative of the 14th Amendment to the United States Constitution and the rights of intervenors, and others similarly situated individuals who were domiciled in and residents of the State of Arkansas, and praying injunctive and other relief. This matter was presented to the

Three-judge District Court on October 1, 1965, upon pleadings, stipulations and oral arguments, after all parties had previously filed briefs, and upon the Court's approval of the Redistricting plan as filed with it, denying injunctive and other relief prayed by appellants, this appeal follows.

The Redistricting plan presented to and approved by the Court is attached to this Jurisdictional Statement as a part of Appendix C, infra at page 37a.

THE QUESTIONS BEFORE THE SUPREME COURT ARE SUBSTANTIAL

The questions presented herein for determination by the Supreme Court are substantial, and of utmost importance not only to the people of the State of Arkansas, but to all other states which have legislatures districted contrary to the provisions of Amendment 14 to the United States Constitution and who must redistrict their states in order to comply with this Amendment.

REDISTRICTING IN ONE COUNTY, ONE MEMBER DISTRICTS; MULTI COUNTY, ONE MEMBER DISTRICTS; ONE COUNTY, MULTI MEMBER DISTRICTS; AND MULTI COUNTY, MULTI MEMBER DISTRICTS.

In redistricting both Houses of the Arkansas Legislature, we find that in each instance the Board of Apportionment has provided for some one-county, one-member district; some one-county, multi-member districts; some multi-county, one member districts; and some multi-member, multi-county districts.

Some of the Multi-county, multi-member districts in the House of Representatives, the district number, county name and populations are as follows:

11, Greene with 25,198 and Craighead with 47,303; 12, Crawford with 21,318 and Sebastian with 66,685; 23, White with 32,745 and Lonoke with 24,511; 29, Lee with 21,001 and Phillips with 43,997; 32, Saline with 28,956 and Hot Springs with 21,893;

and counties which form a one-county, one-member district listed below by district number, county and population are as follows:

3, Boone with 16,116; 10, Lawrence with 17,267; 15, Independence with 20,048; 21, Conway with 15,430; 25, Monroe with 17,327; Cross with 19,551; 34, Hempstead with 19,661; 43, Drew with 15,213; and 44, Chicot with 18,990.

It will be noted that each of the above nine one-county, one-member districts are smaller than the smallest counties in the above five multi-county, multi-member districts. The Three-judge District Court tells us at page 7 (Appendix C, page 33a) of its memorandum opinion of November 4, 1965, "The Constitution does not require that a person residing in a particular county of a multi-county district be represented in the Legislature by a citizen of his own county." We are told, therefore, that the 14th Amendment to the United States Constitution does not mean that the people of Crawford County, or any one of the above five smaller counties in the multi-county, multi-member districts have the same rights as the people in Drew County, or the other one-county, one-member districts.

Appellants respectfully submit that under the equal protection clause of the 14th Amendment to the

United States Constitution, if the 15,213 inhabitants of Drew County are entitled to have a citizen of their county represent them in the Arkansas House of Representatives, that certainly the 21,318 residents of Crawford County would have a like right, which right is not guaranteed if the 21,318 inhabitants of Crawford County must compete with the 66,685 inhabitants of Sebastian County for each one of the five representative positions granted to District 12. Not only this, but each representative that runs in the 12th District must receive approximately five and one-half times as many votes to be elected to Arkansas House of Representatives as the candidate running in Drew County. Certainly Chief Justice Warren in his majority opinion in the case of *Reynolds v. Sims,* 377 U. S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 when he states at the following places:

> U.S. @ 556, L. Ed 2d @ 524, in footnote 29, "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . It also includes the right to have the vote counted at full value without dilution or discount . . . That federally protected right suffers substantial dilution . . . (where a) favored group (h) as full voting strength . . . (and) the groups not in favor have their votes discounted."
>
> And at U.S. @ 560 and L. Ed, 2d 526, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even more basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

Also in the same decision Chief Justice Warren states: "Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or *place of residence within a state.*" (Emphasis supplied).

At U.S. @ 563, L. Ed. 2d 528, we find, "The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their vote is equivalent to that of their favored neighbor. Weighing the votes of the citizens differently, by any method or means, merely because of where they reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' ".

At U.S. @ 565 and L. Ed. 2d @ 529, Chief Justice Warren again says, "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race, . . . ".

Appellants respectfully submit that under the Redistricting plan approved by the District Court, that the inhabitants of the smaller counties in the multi-county, multi-member state representative districts,

such as the 11th, 12th, 14th, 23rd, 29th, 32nd, and other districts, have neither the favored position, an equal right to vote, or an equal right to hold the office of member of the State Legislature as those of such favored one-county, one-member districts as the 3rd, 10th, 15th, 21st, 25th, 26th, 34th, 43rd, and 44th, nor does the weight of the vote of any resident of any multi-member district have the same weight in the election of any state representative as the vote of an individual in the one-county, one-member district.

To say that the voter in Crawford County, or the candidate for the House of Representatives from Crawford County has an equal right with the residents of Sebastian County, is to say that it is as good to have one-fourth of a vote as it is to have three-fourths of a vote when it takes one-half or more of that vote to elect any indivdual.

Under the plan of Redistricting of the State of Arkansas which is being attacked here, 20 counties (excluding Pulaski County, our largest and which has approximately 13 percent of the state's total population) with 38.2 percent of the state's total population will control 51 percent of the total membership of the Arkansas House of Representatives. These include two single-county, multi-member districts and eighteen multi-county districts in which one county contains 59.9 percent or more of the total population of the district, and the counties comprising this select group of 20 are: Mississippi County, District 18; and Crittenden County, District 23, the single county districts; and Pope County, District 4; Baxter County, District 5; Clay County, District 6; Johnson County, District 8; Craighead County, District 11; Sebastian County, Dis-

trict 12; Faulkner County, District 14; Jackson County, District 16; Polk County, District 19; Garland County, District 20; Arkansas County, District 24; Phillips County, District 29; Jefferson County, District 33; Clark County, District 35; Dallas County, District 36; Columbia County, District 39; Union County, District 41; and Ashley County, District 42. To say that a county which has approximately 60 percent, or more, of the total population of an entire district cannot, and will not with a reasonable degree of certainty, control the entire district in political elections, is to ignore our entire history and the inherent self-pride of hometown, county, state and nation, and would require that we completely disregard the previous experience of counties involved in other districts with the same neighboring counties.

MATHEMATICAL FORMULA

Admittedly, in redistricting both houses of the Arkansas Legislature, the Board of Apportionment set up a rigid mathematical standard for evaluating constitutional validity. Formula was as follows:

1. No county in the State of Arkansas was to be divided or placed in more than one district in either house of the Legislature.

2. Legislative districts were to be formed, with reference to both Houses, of one or more continguous counties.

3. Any deviation from the ideal population per legislative district, 17,860 for each member of the House of Representatives and 51,028 for each member of the Senate, would be constitutionally valid if the

deviation from the ideal population did not exceed 15 percent above or before, but any greater deviation would be constitutionally invalid.

The use of this strict formula is further pointed out by the stipulation of the Board of Apportionment that had it believed a deviation of as much as 19 percent above the ideal population would have been constitutionally valid, Crawford County, Arkansas, with a population entitling it the 1.19 state representatives would have been set up as a one-county, one-member district for election of members of the Arkansas House of Representatives.

That no other legally valid criteria was considered in determining the makeup of the various legislative districts might be noted both from the memorandum opinion of the District Court at Page 5 of its memorandum opinion, appearing herein in Appendix C at Page 27a where the Court stated, "There are indeed instances where a district is not comprised of the most compatable counties, based on their diverse geographic and policial composition.", and from an examination of the physical and economic makeup of the various areas. For demonstration purposes only, we will consider Crawford, Sebastian, Cleburne, Van Buren, and Faulkner Counties. Crawford County is predominately a rural, agricultural county with its industries primarily geared to agriculture, to-wit, canning plants, soy bean oil plant and a few industries allied to the furniture manufacturing industry. Sebastian County is predominately urban and industrial, with industries geared more nearly to consumer items. With reference to Van Buren and Cleburne Counties, we find that these are predominately rural upland areas of a live-

stock raising type agriculture, while Faulkner County is much more nearly an urban county with its industry and bottom land type agricultural areas being geared to the Arkansas River Development Program. We mention these specific counties because appellants are much more familiar with them, but respectfully submit that these are representative, and not isolated instances.

At page 4 of the District Court's memorandum opinion, Appendix C, page 30a, the District Court stated, "While a number of variations are substantial, none of them exceed the 15 percent suggested as tolerable in *Toombs v. Fortson,* N. D. Ga., 241 F. Supp. 65, and *Wesberry v. Van Diver,* N. D. Ga., 206 F. Supp. 276, rev'd. on other grounds, *Wesberry v. Van Diver,* 376 U. S. 1." Appellants respectfully submit that under the decisions of this Court, neither the Toombs nor Wesberry case are valid authority for holding that a 15 percent deviation, or variation is the maximum constitutionally permissable. Wesberry is a case concerned with reapportionment of a state for election of members of the United States House of Representatives, and this Court in *Reynolds v. Sims,* 377 U. S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1364, and @ 578 in the United States Reports and @ 537 in the Law Edition 2d states:

> "Somewhat more flexibility may, therefore, be constitutionally permissable with respect to State Legislative apportionment than in Congressional Districting."

While certain District Courts have attempted to set up some uniform formula, based upon rigid mathematical standards in determining the constitutional

validity of State Legislative reapportionment, this Court has repeatedly held from the Reynolds case throughout that " . . . the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a State Legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose Legislative reapportionment is at issue, there has been a faithful adherence to a plan of population based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint or arbitrariness or discrimination." *Roman v. Sincock,* 377 U. S. 695, 12 L. Ed. 2d 620, 84 S. Ct. 1462.

It will be noted that in the Roman case, this Court was referring to a case where the lower Court had held that while a deviation of 1.5 to 1 would meet minimal constitutional requirements, that a greater deviation would be too extreme to be constitutionally suitable, but it will be noted that this Court refused to agree that a variation of more than 1.5 to 1 would be too great a deviation to meet the constitutional requirements.

In the case of *Lucas v. Colorado General Assembly,* 377 U. S. 713, 12 L. Ed. 2d 632, 84 S. Ct. 1472, this Court, while reversing the case for other reasons, would not say that, where proper circumstances existed, a deviation of 1.7 to 1 would necessarily be unconstitutional.

In the instant case, we have squarely before this

Court the question of whether a deviation in excess of 15 percent above or below the ideal population for a State Legislative district can, under any circumstances be constitutional, in that the Board of Apportionment has stipulated that if, under any circumstances, a deviation of as much as 19 percent above the ideal population for a State Legislative district, that under its plan of apportionment, Crawford County, Arkansas, is entitled to, and will, under its plan, become a one-county, one-member state House of Representative District, and in addition to this, that other districts would probably be differently set up.

ADDITIONAL GUIDELINES

As additional guidelines in protecting the constitutional rights of citizens of the State of Arkansas, and of the entire United States in general, under the Equal Protection Clause of the 14th Amendment to the United States Constitution, but without suggesting these as the only solutions, since appellants are interested only in guaranteeing to themselves and others in similar positions, rights under the 14th Amendment to the United States Constitution, if the following plans, or either of them, can be constitutionally used in apportioning state Legislatures, the guideline will be very helpful in protecting rights of various citizens.

It is suggested by one of the appellants that the State of Arkansas should, being a bicameral legislative state, have at least one house of its Legislature, the House of Representatives, since the State Senate is set

up otherwise, divided into 100 one-member districts, without regard to county lines, so that there would be 100 legislative house districts, each composed of a population of approximately 17,860 inhabitants.

It has further been suggested that, at least the Arkansas House of Representatives, could constitutionally be districted on a basis of assigning to each county with 17,860 residents, or equal multiples thereof, one State Representative for each 17,860 inhabitants, and divide the remaining members of the State House of Representatives between the counties, on the basis of one representative to each county or unit most nearly entitled to an additional representative, based upon the population ratio, forming counties too small to be set up as a one county unit, because of insufficient population, into multi-county units, assigning to them one representative on a basis of population of not less than the population which entitles an individual county to an additional representative, or a county to an additional representative.

The latter plan is set out here for determination, since the states have traditionally and historically been set up in county, or other similar state subdivisions, which ordinarilly have not only historical and economical interests of a similar nature, but also have other factors binding them together as a unit and if such a plan can be constitutionally established, permitting the states, within reasonable bounds of equal representation for equal population, to retain, at least to a large extent, counties as political sub-divisions for all governmental functions, including legislative representation, much benefit can be derived.

CONCLUSION

In conclusion, it is respectfully submitted that where both Houses of bicameral state legislatures are permitted to be set up on the basis of some districts having a one-county, one-member district; some counties having a one-county, multi-member district; some districts having a multi-county, one-member district; and others having a multi-county, multi-member district, this plan best fits itself to gerrymandering, and arrives at a result where large segments of the entire population are deprived of any effective voice in their state legislative body, and therefore, are deprived of the right to have a voice in the passing of laws under which they must live.

The Arkansas Redistricting Plan approved by the Three-judge United States District Court was set up under a rigid mathematical standard of deviation of 15 percent or less being constitutional, while deviation of more than 15 percent would, under any circumstance, be unconstitutional, and is violative of the 14th Amendment to the United States Constitution and in complete opposition to this Court's express instructions in the Roman case where it stated, " . . . the problem does not lend itself to such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of the state legislative apportionment scheme under the Equal Protectional Clause.", and further are in opposition to the Roman and Lucas cases where this Court was not willing to hold that a deviation of 1.5 to 1 or even 1.7 to 1, would be unconstitutional under any and all circumstances. The Board of Apportionment has stipulated that if, under any circumstances, a deviation of as much as 19 percent would be consti-

tutionally valid, that Crawford County, Arkansas, should be set up as a one-county, one-member district rather than being placed in a district with Sebastian County, Arkansas, and that various other districts probably should be set up differently.

It is respectfully submitted that the Supreme Court has jurisdiction, and should hear this appeal and reverse the Court below with instructions to require the Arkansas Board of Apportionment, by mandatory injunction, to legally district the State of Arkansas for membership in the Arkansas Legislature, in accordance with the provisions of the 14th Amendment to the United States Constitution, and in event of the failure of the Board of Apportionment to comply with this mandatory injunction, that the District Court formulate a constitutional districting plan for both houses of the Arkansas Legislature and by mandatory injunction require the Board of Apportionment to place this plan into effect. Questions herein are important to the constitutional and valid districting of States with reference to membership in the state legislative branch and for the equal protection of citizens and residents of the State of Arkansas under the 14th Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHN YANCEY ..... *Plaintiff*)
v.) **LR-64-C-96**
ORVAL E. FAUBUS, GOVERNOR)
KELLY BRYANT, SECRETARY OF STATE) **Memorandum**
BRUCE BENNETT, ATTORNEY GENERAL)
"THE BOARD OF APPORTIONMENT",) **Opinion**
Defendants.)

Thorp Thomas of Little Rock, Arkansas, for Plaintiff.

Bruce Bennett, Attorney General, State of Arkansas, and Jack L. Lessenberry, Chief Assistant Attorney General, Little Rock, Arkansas, for Defendants.

HENLEY, Chief District Judge.

On June 15, 1964, the Supreme Court of the United States handed down a series of decisions, hereinafter referred to as the Reapportionment Cases, holding in substance that the Equal Protection Clause of the 14th Amendment to the Constitution of the United States requires hat the membership of each house of a bicameral State legislature be apportioned so that, as nearly as practicable, each member of the respective houses represents the same number of people. *Reynolds v. Sims,* 377 U.S. 533; *WMCA, Inc. v. Lomenzo,* 377 U.S. 633; *Maryland Committee For Fair Representation v. Tawes,* 77 U.S. 656; *Davis v. Mann,* 377 U.S. 678; *Roman v. Sincock,* 377 U.S. 695; *Lucas v.*

Colorado General Assembly, 377 U.S. 713. Those decisions were foreshadowed by *Baker v. Carr*, 369 U.S. 186, decided in 1962, holding that the federal courts have jurisdiction with respect to controversies relating to State legislative apportionment.

On July 15, 1964, plaintiff herein, John Yancey, a citizen and qualified elector of Pulaski County, Arkansas, the State's most populous county, commenced this action against the Governor of Arkansas, the Arkansas Secretary of State, and the Arkansas Attorney General, attacking the existing apportionment of the membership of both houses of the Arkansas Legislature which is currently meeting in its 65th biennial session. The defendants collectively comprise the Board of Apportionment created by section 1 of Amendment 45 to the 1874 Constitution of Arkansas for the purpose of making decennial reapportionments of both the Arkansas Senate and House of Representatives in the manner prescribed by sections 2 and 3 of the Amendment.

The complaint, as amended, alleges in substance that the scheme of apportionment and reapportionment prescribed by Amendment 45 does not meet the standard laid down by the Supreme Court of the United States in the Reapportionment Cases, supra, and is invalid, and that for the same reason the present apportionment of the membership of the Legislature is invalid.[1] The prayer of the complaint is that sections 2 and 3 of the Amendment, hereinafter abstracted, be declared unconstitutional, and that the Board be re-

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[1] Plaintiff does not challenge the right of the present Legislature to function as a legislative body.

quired by this Court to effect a constitutional reapportionment of both the House and the Senate.

In its answer the Board denies that sections 2 and 3 of the Amendment are unconstitutional, and prays that the complaint, as amended, be dismissed.

Since the complaint challenged the constitutionality of a State constitutional provision and prayed for an injunction against the continued enforcement of that provision, a statutory court of three judges was convened pursuant to 28 U.S.C.A., §§2281, 2284, and the case has been submitted to that Court.

Federal subject matter jurisdiction is not questioned and has been established. It has been admitted or stipulated that plaintiff has standing to maintain the action, that the defendants constitute the Board of Apportionment to which reference has been made, and that the validity of the existing apportionment of the membership of the Arkansas Legislature is to be determined by reference to the United States Census for 1960. The materials before the Court include maps, agreed to be accurate, on whichare depicted the seventy-five counties of the State, the population of each County according to the 1960 census, the twenty-six senatorial districts into which the State is subdivided, the number of representatives which each County has in the House, and the number of senators which each senatorial district has in the Senate. Other facts relevant to decision are such that judicial notice may be taken of their existence.

Prior to hearing, the defendants filed a motion for a stay of the instant proceedings for the purpose of

permitting reapportionment litigation in the State courts to be initiated and prosecued to conclusion. That motion was pending when a pre-trial conference was held before the single judge to whose docket the case fell originally, and the pre-trial conference order provided that the motion for a stay and the merits of the case would be considered at a single hearing which was set for January 7, 1965.

On January 6, 1965, Hon. Clark Kinney, a member of the Arkansas House of Representatives from St. Francis County, commenced a suit against the Board in the Chancery Court of Pulaski County seeking to determine the present status of the Board and seeking to require it to make a constitutional reapportionment of the Legislature.

The hearing in this case was held on January 7. The plaintiff appeared in person and by counsel; the Board appeared by the Attorney General. At the commencement of the hearing the Board renewed its motion to stay on the basis of the Kinney litigation which has been mentioned. Plaintiff resisted the motion.

The proceedings at the hearing consisted of steps necessary to perfect the record before the Court and of oral arguments both on the motion to stay and on the merits. At the conclusion of the hearing both the motion and the merits were taken under advisement.

So far as the motion to stay is concerned, the Court does not see that any useful purpose would be served by withholding decision at this time on the basic federal question of whether the existing scheme of apportion-

ment and the existing apportionment of the membership of the Arkansas Legislature are constitutionally valid. On the contrary, the Court is convinced that it is in the best interest of all concerned for this Court to adjudicate that question now. Whether the Court should go beyond that adjudication will be discussed in connection with the merits of the case. The motion for a stay of proceedings, as such, will be denied.

The Arkansas Legislature consists of a House of Representatives at 100 members, and a Senate of 35 members. At least in practice, each Representative and each Senator has one vote in his respective House. All of the Constitutions of Arkansas[2] have provided for periodic reapportionments of the Legislature on the basis of population. The responsibility for reapportionment was originally placed upon the Legislature itself, but in 1936 the voters of Arkansas adopted Amendment 23 which created a Board of Apportionment and place in its hands the duty of reapportioning both House of the Legislature following each federal census, but with an initial reapportionment to be made in 1937. Acting under Amendment 23 the Board made its 1937 reapportionment and also reapportioned in 1941 and 1951. In 1956 Amendment 23 was superseded by Amendment 45 here in controversy.

As indicated, section 1 of the Amendment establishes the Board and charges it with the duty of making reapportionments. Section 2 provides that the House shall consist of 100 members with one member

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[2] The original Constitution of 1836, Article IV; the Constitution of 1861, Article IV; the Constitution of 1864, Article IV; the Constitution of 1868, Article V; and the present Constitution of 1874, Article 8.

guaranteed to each of the State's 75 counties regardless of population. The remaining 25 seats in the House are to be equally distributed, as nearly as practicable, among the more populous counties "in accordance with a ratio to be determined by the population of said counties as shown by the federal census next preceding any apportionment hereunder."

Section 3 of Amendment 23 had directed that the membership of the Senate, like that of the House, be reapportioned on the basis of population with each Senator representing, as nearly as practicable, an equal number of people. Section 3 of Amendment 45, however, provides that the senatorial districts as now constituted and existing as directed by the Supreme Court of Arkansas in the case of *Pickens v. The Board of Apportionment*, 220 Ark. 145, 246 S.W. 2d 556, "shall remain the same and the number of Senators from the districts shall not be changed."

Section 4 of the Amendment provides that the Board shall file its report with the Secretary of State not later than February 1 of the year immediately following each federal census. Section 5 authorizes the Supreme Court of Arkansas by mandamus or otherwise to compel the Board to do its duty. That section also authorizes the Supreme Court in original proceedings to review Board action and to revise arbitrary or capricious apportionments, provided that such proceedings are instituted within 30 days after the report of the Board is filed with the Secretary of State.

Section 6 of the Amendment provides that at the next general election following a reapportionment Representatives shall be elected in accordance therewith,

and that Senators "shall be elected henceforth according to the apportionment now existing, and their respective terms of office shall begin on January 1 next following." That section also provides that the terms of Senators shall be of four years duration.

The case of *Pickens v. The Board of Apportionment* mentioned in section 3 of Amendment 45 was an exercise by the Supreme Court of the power of revision conferred by section 5 of the then existing Amendment 23. The Board had made a reapportionment in 1951 following the 1950 census, but made no change in the distribution of Senate seats. The Supreme Court held that certain changes had to be made, and put those changes into effect.

When the Supreme Court in *Pickens* made changes in the distribution of Senate seats, section 6 of Amendment 23 came into play. That section, as construed in *Bailey v. Abington*, 201 Ark. 1072, 148 S.W. 2d 176, and *Butler v. Democratic State Committee*, 204 Ark. 14, 160 S.W. 2d 494, required that following any apportionment which resulted in changes in the make-up of the Senate, the entire Senate had to be classified by lot with one class of 18 Senators having terms of two years and the other class of 17 Senators having terms of four years.[3]

When the Supreme Court of Arkansas changed the distribution of Senate seats in 1951, the Senators

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[3] In 1941 the Board did not change the original reapportionment which it had made in 1937, and it was held in **Bailey** and **Butler** that since there had been no changes made by the Board in senatorial apportionment, there was no necessity for a classification of Senators under section 6 of Amendment 23.

had to be classified under section 6 of Amendment 23, and some Senators who had been elected at the General Election of 1950 ostensibly for terms of four years found their terms foreshortened and were required to run again in 1952 rather than in 1954. Since Amendment 45 is a substantial reenactment of Amendment 23, as far as the House is concerned, it is at least inferable that the purpose of its enactment was to protect Senators from future experiences with section 6 of Amendment 23.

The practical effect of Amendment 45 is to freeze permanently the distribution of Senate seats on the basis of the distribution of the State's population as of 1950. In other words, under Amendment 45 the Senate is no longer subject to reapportionment. As to the House, apportionment, while based on population, is limited by the guarantee of at least one Representative to every county and by the limitation of the membership of the House to 100. Thus, while the House can be reapportioned, the reapportionment is limited to 25 free seats.

Following the census of 1960 the Board in 1961 apportioned the House seats using a method designed to make as few changes as possible in the existing apportionment. The 25 free seats were distributed among 16 counties as follows:

County	Population	Guaranteed Seat	Apportioned Seats
Pulaski	242,980	1	7
Jefferson	81,373	1	2
Mississippi	70,174	1	2

Sebastian	66,685	1	2
Washington	55,797	1	1
Union	49,518	1	1
Crittenden	47,564	1	1
Craighead	47,303	1	1
Garland	46,697	1	1
Phillips	43,997	1	1
Benton	36,272	1	1
St. Francis	33,303	1	1
White	32,745	1	1
Miller	31,686	1	1
Ouachita	31,641	1	1
Poinsett	30,834	1	1
		16	25

The Board's apportionment of the House seats was challenged under section 5 of Amendment 45, and was revised by the Supreme Court of Arkansas in *Stevens v. Faubus,* 234 Ark. 826, 354 S.W. 2d 707. The Court held that the Board had misconceived its function in undertaking to make as few changes as possible, and stated that it was the function of the Board to make changes and not to preserve the status quo. The Court also held, in line with its earlier decision in *Shaw v. Adkins,* 202 Ark. 856, 153 S.W. 2d 415, that the House seats available for apportionment should be apportioned in a manner similar to that employed in apportioning members of the federal House of Repre-

sentatives where each State is guaranteed at least one member.

The Court then proceeded to apportion the 25 free seats by employing the formula approved in *Shaw v. Adkins,* supra. Under the Court's apportionment the 25 free seats went to twelve counties, hereinafter called apportioned counties, as shown by the following table:

County	Population	Guaranteed Seat	Apportioned Seats
Pulaski	242,980	1	10
Jefferson	81,373	1	3
Mississippi	70,174	1	2
Sebastian	66,685	1	2
Washington	55,797	1	1
Union	49,518	1	1
Crittenden	47,564	1	1
Craighead	47,303	1	1
Garland	46,697	1	1
Phillips	43,997	1	1
Benton	36,272	1	1
St. Francis	33,303	1	1
		12	25

According to the federal census reports, the population of Arkansas declined during the decade between 1950 and 1960 from 1,909,511 to 1,786,272, and this

decline was reflected in almost all of the 75 counties. However, the population of six individual counties increased. The heaviest increase was in Pulaski County which jumped from approximately 197,000 in 1950 to 242,980 in 1960. Other counties whose population increased during the period in question were Crittenden, Jefferson, Saline, Sebastian, and Washington.

Not only was there a decline in the overall population of the State, there was also a marked shift in population from rural to urban areas. Again according to the census, while the State as a whole lost 6.5 percent of its population, the population of all urban areas increased by 21.4 percent, whereas the population of rural areas declined by 20.2 percent. Manifestly, this shift in population from the rural to the urban areas of Arkansas cannot, under Amendment 45, be reflected in the make-up of the Senate, and it can be reflected in the make-up of the House only to the extent that the 25 free seats can be allocated to the more populous counties under the "equal proportions" method of distribution approved in *Shaw v. Adkins* and *Stevens v. Faubus,* both supra.

In the first of the Reapportionment Cases, *Reynolds v. Sims,* supra, the Supreme Court of the United States said (p. 568 of 377 U.S.):

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."

It was also said (p. 577 of 377 U.S.):

> "By holding that as a federal constitutional requisite both houses of a state legislature must be

apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal protection as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

It was recognized in *Sims* that a State may deviate somewhat from a strict population basis of apportionment for the purpose of "insuring some voice to political subdivisions, as political subdivisions." 377 U.S. 581.

But the Court warned:

" * * * Carried too far, a scheme of giving at least one seat in one house to each additional subdivision (for example to each county) could easily result in many States in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens

to cast an effective and adequately weighted vote would be unconstitutionally impaired." (Ibid.)

I.

Accepting, as we must, the decisions of the Supreme Court of the United States as ruling here, it is clear to us that the apportionment of the membership of the Arkansas Senate required by Amendment 45 is unconstitutional.

In considering the apportionment of the Senate it is noted that prior to the adoption of Amendment 45 the Arkansas Senate was, at least theoretically, apportioned on the basis of population with the qualifications that the senatorial districts should be "convenient," that they should be made up of contiguous territory, and that no county should be divided in the formation of a senatorial district.

In *Butler v. Democratic State Committee,* supra, the Court stated (p. 19 of 204 Ark.):

> " * * * The purpose of [Amendment 23] was, of course, to secure equal and fair representation in the General Assembly upon the basis of proportionate population. It was recognized that a census of the state's population would be taken by the federal government every ten years, and it was contemplated and required that the adjustment or apportionment of representation should be based upon this census, and it was made the imperative duty of the Board of Apportionment to make apportionment of representatives and senators after the taking of each federal census. No discretion was vested in the Board as to whether this duty should be performed. * * * "

Again, in *Smith v. The Board of Apportionment*, supra, it was said (pp. 613-614 of 219 Ark.):

> "The comprehensive measure affecting senatorial districts prior to 1937 was Act 129 of 1901, p. 201. * * * Section 2 of Art. 8 of the Constitution of 1874 was a mandate to the legislature to divide the state into convenient districts from time to time in such manner that the senate would be based upon the state's adult population, each senator as nearly as practical to represent an equal number of male inhabitants. The districts were created, temporarily as it was then thought, until the population of counties as reflected by the Federal census of 1880 should become available as the basis of a better plan.
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> "Amendment No. 23 imposes upon the * * * Board the *imperative* duty of making assignments of senators to districts as created. Section 3 fixes membership of the senate at 35. Districts shall consist of contiguous territory, but a county must not be divided. With these limitations upon the one hand and affirmative mandates upon the other, the state is to be divided into convenient districts '. . . in such manner that the senate shall be based upon the inhabitants of the state, each senator representing, as nearly as practicable, an equal number thereof, [and] each district shall have at least one senator.' It will be noted that some of the language of the Amendment is so harmonious with certain expressions in § 2 of Art. 8 of the Constitution as to suggest that the phrasing was copied."

By Act 29 of 1901 the State was divided into 34 senatorial districts. Under that Act the 10th District consisted of Pulaski and Perry Counties, and it was allotted two senators. All of the other districts had one each. As pointed out in *Smith*, supra, 219 Ark.

at 614, the membership of the Senate was not reapportioned after 1901 until Amendment 23 became effective in 1937. In that year the districts were rearranged, and Pulaski County became a senatorial district to itself and was allotted two senators. No change was made in 1941. In 1951 the Supreme Court in both *Smith* and *Pickens* recognized that population changes throughout the State made it imperative that there be a change in the make-up of the Senate.

The Court divided the State into 26 senatorial districts.[4] Seven of those districts were allotted more than one Senator, and the remaining 19 districts were given one apiece. It was this apportionment which was frozen into the Constitution by Amendment 45, and is the one with which we are now concerned.

Using population alone as a bisis for allocating Senate seats, and taking 1,786,000 as a round population figure for Arkansas in 1960, the "natural" or "ideal" ratio for the allocation of such seats is one Senator for every 51,028 people. Five of the existing senatorial districts approach that ratio very closely; the remaining twenty-one depart from it rather widely, in instances extremely, in both directions.

The five districts coming closest to the ideal ratio are: The 13th District consisting of Union County alone; the population of Union County is 49,518, there is one seator, so the ratio is one to 49,518. The 18th District consisting of Izard, Independence, and Jack-

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[4] The **Pickens** apportionment appears in the table set out at pages 151-152 of 220 Ark.; see also the map of the State divided into senatorial districts which appears at page 153 of 220 Ark.

son Counties, having a population in 1960 of 49,657 and one Senator; the ratio is one to 49,657. The 24th District consisting of Craighead, Mississippi, and Poinsett Counties, having a population of 148,311 and three Senators; the ratio is one to 49,437. The 25th District, consisting of Cross, Crittenden, and St. Francis, having a 1960 population of 100,418 and two Senators; the ratio is one to 50,209. The 26th District consisting of Monroe, Lee, Phillips, and Arkansas Counties, having a population of 105,680 and two Senators; the ratio is one to 52,840.

On the other hand, the 15th District consisting of Pulaski County alone with a 1960 population of 242,980 had only three Senators, the ratio being one to 80,993. The 4th District consists of Sebastian County alone and has been allotted one Senator. The 1960 population of Sebastian County, which includes the City of Fort Smith, was 66,685 so that the 4th District's ratio was one to 66,685. The ratio in the 2nd District is one to 64,865. The 12th District, consisting of Ouachita and Columbia Counties, has a ratio of one to 58,041. The 11th District, consisting of Garland, Saline, Hot Springs, and Clark Counties, had a 1960 population of 118,496 and two Senators; the ratio for that District is one to 59,248. All of the districts mentioned in this paragraph are seriously under-represented in the Senate.

Other districts with one or two Senators are more or less over-repreesnted. This over-representation may be summarized as follows:

District	Counties	Number Senators	Population	Ratio One to	Percent of Over-Representation Approximate
1st	Benton Carroll	1	47,556	47,556	6
3rd	Crawford Franklin Johnson	1	43,952	43,952	14
5th	Logan Scott Yell Montgomery	1	40,564	40,564	20
6th	Polk Howard Sevier Little River	1	42,226	42,226	17
7th	Pike Hempstead Nevada	1	38,225	38,225	25
8th	Miller LaFayette	1	42,716	42,716	16
9th	Boone Marion Baxter Newton Searcy	1	46,187	46,187	9
10th	Pope Conway Perry	1	41,534	41,534	18

District	Counties	Number Senators	Population	Ratio One to	Percent of Over-Representation Approximate
14th	Stone Van Buren Cleburne Faulkner	1	46,884	46,884	8
16th	Grant Dallas Bradley Cleveland Calhoun	1	45,780	45,780	10
17th	Fulton Randolph Sharp Lawrence	1	42,763	42,763	16
19th	White Lonoke Woodruff Prairie	2	81,765	40,887	19
20th	Jefferson Lincoln	2	95,820	47,910	6
21st	Drew Desha	1	35,983	35,983	29
22nd	Ashley Chicot	1	43,210	43,210	15
23rd	Clay Greene	1	46,456	46,456	9

From the figures that have been given it is apparent that the five districts in which the ratios most

closely approach the ideal ratio contain 453,584 persons, or approximately 25 percent of the population of the State, and have allotted to them nine of the 35 Senate seats.[5] The under-represented districts have a population of 551,067 or about 31 percent of the total State population, and control eight seats. And the over-represented districts containing 781,721 persons or about 44 percent of the population control 18 of the 35 Senate seats. Thus, a minority of the people controls the Senate.

The disparities which existed in the Senate apportionment in 1961 were greater than they were in 1951, and the disparities which exist today are probably more glaring than those which existed four years ago because the population shift to the urban areas apparently is continuing. So long as Amendment 45 remains in force those disparities cannot be corrected no matter how much the Board may be inclined to correct them.

In the light of the requirement of the Apportionment Cases that State senatorial districts be so constructed that each Senator represents, as far as practicable, the same number of people, the apportionment prescribed by section 3 of Amendment 45 simply cannot stand.

II.

Nor do we think that the apportionment of the Arkansas House of Repreesntatives meets the consti-

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[5] Some of the districts which most closely approach the ideal ratio are in fact over represented to some extent and others are under represented to some extent.

tutional standard laid down by the Supreme Court of the United States.

In 1930 the population of Arkansas in round figures was 1,854,000; in 1940 it was 1,949,000. In the decade between 1940 and 1950 the population declined to 1,910,000, and, as indicated, by 960 it was down to 1,786,000.

Acting pursuant to Amendment 23 the Board apportioned the House in 1937 on the basis of the 1930 census, and kept the same apportionment in effect following the census of 1940. The Board, of course, allotted one House seat to each of the 75 counties. It then apportioned the 25 free seats as follows: Pulaski County, six; Mississippi, Sebastian, Jefferson, and Union Counties, two each; Craighead, Phillips, Crittenden, Garland, Washington, White, Benton, St. Francis, Hempstead, Miller, and Lonoke Counties, one each.

The Board's 1937 apportionment does not appear to have been challenged in the Supreme Court, but there was such a challenge with respect to the 1941 apportionment. *Shaw v. Adkins, Governor,* supra. The Supreme Court of Arkansas after giving careful consideration to the problem revised the Board's action so as to give Mississippi and Poinsett Counties an additional seat each and so as to take away a seat each from Lonoke and Union Counties.

In 1951 the Board reapportioned the House and made certain changes in the allocation of the free seats.[6]

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[6] The Board's 1951 apportionment is set forth in the table appearing in **Stevens v. Faubus,** supra, 234 Ark. at 830.

The 1961 apportionment of the House by the Board, which apportionment was revised by the Court in Stevens, supra, was very little different from the 1951 apportionment notwithstanding Arkansas' loss of population and the shift of population to the more populous counties.

The natural ratio of representation in the House, based on the 1960 census, is one representative to every 17,860 people. The actual ratio in what we have called the "apportioned counties" is one Representative to every 22,207 people, about 25 percent above the ideal; and the actual ratio in the unapportioned counties is one Representative for every 15,311 people or about 14 percent below the ideal. In other words, the apportioned counties, particularly Pulaski, are seriously under represented, and the less populous unapportioned counties are substantially over represented. The apportioned counties, which have a combined population of 821,663 or about 46 percent of the State's total, control 37 of the 100 House seats, and the unapportioned counties, having about 54 percent of the population, control 63 of those seats.

The county-to-county disparity in ratio is glaring indeed as is evident from even a casual glance at a list of the 75 counties with their 1960 populations. A few examples will suffice. In Pulaski County the ratio is one Representative to 22,089 people, whereas in Perry County, the smallest in the State from the standpoint of population, the ratio is one to 4,927. In Baxter County the ratio is one to 9,943; in Howard County it is one to 10,878; in Marion County it is one to 6,041; in Mississippi County, which has two Representatives,

the ratio is one to 37,087; in Searcy County it is one to 8,124; and in Sebastian County it is one to 33,343.

While the House membership, unlike that of the Senate, is flexible to some extent, we are convinced that the present guarantee of one Representative each to the smaller counties without regard to population, and the 100 member litigation on the size of the House effectively prevent equality of representation on the basis of population.

III.

There remains for consideration the question of whether we should undertake to grant any mandatory relief at this time and, if so, the nature and extent of the relief to be granted. In approaching this question it is well to keep in mind that the only defendants before us are the members of the Board of Apportionment; no other State agency is before the Court.

Our decision that Amendment 45's apportionment of the membership of the Legislature is unconstitutional immediately raises serious questions of State constitutional law which, if answered ultimately, must be answered by the Supreme Court of Arkansas. While the members of this Court may think that they know the answers to those questions, no opinion which we might express would be more than a forecast as to what the Supreme Court of Arkansas eventually might hold. Some or perhaps all of the answers may be produced in connection with the Kinney litigation in the Chancery Court which has been mentioned.

In view of the situation just outlined, we admit the temptation to go no further at this time than to

declare the existing apportionment scheme unconstitutional, leaving it to the State, including the Judicial Branch of its Government, to bring about a valid reapportionment as best it can.

We do not think, however, that in a case of this importance we should stay our hand, particularly in view of the fact that whatever reapportionment there is to be should take place and be tested in time to be the basis for the 1966 general election which will take place in November of that year. Cf. *Maryland Committee v. Tawes,* supra, 77 U.S. at 676.

The Board of Apportionment is before the Court, and whether rightly or wrongly the Board is taking the position that it has or probably has the power to make a valid reapportionment. Since the Board takes this position, we think that it should be directed and it will be directed, to come forth with a valid scheme of apportionment not later than June 15 of the current year. If it develops ultimately that the Board has no such power as a matter of State law, the Court can then take such steps as may seem necessary or appropriate in the circumstances, including the addition of other parties defendant if such a course seems necessary or desirable.

The Court is aware that the Legislature is now in session, and the Court is aware also that the possibility of that body taking some action itself in the field of reapportionment is being discussed rather widely. Our directive to the Board to proceed to make a reapportionment by June 15 is certainly without prejudice to the right of the Legislature to take such action in the field as it may deem to be proper or judicious.

After all, this Court is not directly concerned at this time with what body brings about a valid reapportionment, nor is it concerned with what particular scheme may be adopted ultimately provided that the chosen scheme meets the constitutional requirement laid down by the Reapportionment Cases.

An appropriate decree will be entered. Jurisdiction of the case will be retained for such further proceedings herein as may be justified or required.

Dated this 28 day of January, 1965.

Pat Mehaffy
United States Circuit Judge

J. Smith Henley
United States District Judge

Gordon E. Young
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHN YANCEY ..... *Plaintiff*	)	
v.	)	LR-64-C-96
ORVAL E. FAUBUS, GOVERNOR	)	
KELLY BRYANT, SECRETARY OF STATE	)	
BRUCE BENNETT, ATTORNEY GENERAL	)	
"THE BOARD OF APPORTIONMENT",	)	
Defendants.	)	

DECREE

Pursuant to memorandum opinion this day filed herein, it is by the Court CONSIDERED, ORDERED, ADJUDGED, and DECREED that the existing apportionment of the membership of the House of Representatives and of the Senate of the State of Arkansas and the method of apportionment of the membership of those bodies prescribed by Sections 2 and 3, respectively, of Amendment No. 45 to the Constitution of Arkansas of 1874 be, and they hereby are, declared to be constitutionally invalid and void and violative of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States as construed by the Supreme Court of the United States in the Reapportionment Cases referred to in said memorandum opinion.

It is further CONSIDERED, ORDERED, ADJUDGED, and DECREED that the defendants and their successors in office be, and they hereby are, man-

datorily enjoined, directed, and required to undertake to formulate and put into effect a reapportionment of the membership of the House of Representatives and of the Senate of the Arkansas Legislature which will meet the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, as construed in the aforesaid Reapportionment Cases, the work of the Board to be completed not later than June 15, 1965.

The Court retains jurisdiction of this cause for such other and further proceedings as may appear necessary or appropriate.

Dated this 28 day of January, 1965.

Pat Mehaffy
United States Circuit Judge

J. Smith Henley
United States District Judge

Gordon E. Young
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHN YANCEY ..... *Plaintiff*)
v.) **LR-64-C-96**
ORVAL E. FAUBUS, GOVERNOR)
KELLY BRYANT, SECRETARY OF STATE) **Memorandum**
BRUCE BENNETT, ATTORNEY GENERAL)
"THE BOARD OF APPORTIONMENT",) **Opinion**
Defendants.)

Before MEHAFFY, Circuit Judge, HENLEY, Chief District Judge, and YOUNG, District Judge.

PER CURIAM.

On January 28, 1965, this Court held that the scheme of apportionment of the membership of the Arkansas Legislature prescribed by sections 2 and 3 of Amendment 45 to the 1874 Constitution of the State of Arkansas was unconstitutional, and that defendants, members of the Board of Apportionment created by section 1 of that Amendment, would be required to prepare and put into effect a constitutional reapportionment of both the House of Representatives and the Senate. *Yancey v. Faubus,* E. D. Ark., 238 F. Supp. 290. An appropriate decree was entered from which there was no appeal.

On May 17, 1965, the Supreme Court of Arkansas held that as a matter of State constitutional law our

decision that the former plan of apportionment was invalid did not affect adversely other sections of the Amendment, and that the Arkansas Legislature would continue to consist of a House of Representatives of 100 members and of a Senate of 35 members, and that the Board of Apportionment had the authority under section 1 of the Amendment to make a valid reapportionment. *Faubus v. Kinney,* 239 Ark. 443, 389 S.W. 2d 887. [1]

On July 15 of the current year the Board, in obedience to our decree, filed a plan of reapportionment, which plan is set forth as Appendix A to this opinion. The plan was filed originally with this Court and not with the Secretary of State of the State of Arkansas as provided by section 4 of Amendment 45. While the written record before us does not expressly reflect that the plan has ever been filed with the Secretary of State, we have been advised informally that it was in fact filed with the Secretary after it was filed here.

In due course the plaintiff, John Yancey, a citizen and qualified elector of Pulaski County, filed objections to the plan. Objections have also been filed by intervenors, Cecil L. Alexander and Mac Evans, members of the Arkansas House of Representatives from Cleburne and Van Buren Counties, respectively, and by representatives of the Crawford County Bar Association. Plaintiff objects generally to the plan;

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[1] In the original proceedings in this Court the Board asserted that it possessed the power to reapportion otherwise than was provided by sections 2 and 3 of Amendment 45, and we took the Board at its word. The matter was discussed in our original opinion. Pages 300-302 of 238 F. Supp.

the objections of the intervenors are not only general but also specific to the extent that the plan affects the House representation of Cleburne, Crawford, and Van Buren Counties.

The objections have been heard upon documentary evidence, prehearing briefs, and oral argument.

Under the prior apportionment the State of Arkansas contained 75 House districts, with each of the 75 counties being a district; the Senate was made up of members from 26 districts, and the districts and the membership of the Senate were "frozen" on the basis of distribution of Arkansas' population according to the census of 1950.

Under the new plan the State has 44 House districts and 25 Senate districts. Some of the districts of both types contain more than one county and some of both types are to be represented by more than one member.

The record before us reflects, and we find, that in preparing and submitting its plan the Board undertook in good faith to make a valid reapportionment of the Legislature in conformity with the principles laid down in what we have called the Reapportionment Cases,[2] which require that both houses of a bi-cameral State legislature be apportioned, insofar as practicable, so that each member of each house represents approximately the same number of people, but permitting

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[2] **Reynolds v. Sims,** 377 U. S. 533; **W.M.C.A., Inc. v. Lomenzo,** 377 U.S. 633; **Maryland Committee for Fair Elections v. Tawes,** 377 U. S. 656; **Davis v. Mann,** 377 U. S. 678; **Roman v. Sincock,** 377 U. S. 695; **Lucas v. Forty-Fourth Colorado General Assembly,** 377 U. S. 713.

limited consideration to be given to other relevant factors such as geography, political subdivisions, and the like. The political philosophy underlying those decisions is frequently referred to by the slogan, "one man, one vote."

We further find that the Board in making its reapportionment gave primary consideration to population, as it was required to do; however, the Board in constituting the new districts undertook to respect county lines and to create districts of convenient size and numerous enough to insure maximum representation to the largest possible number of individual counties.

The reapportionment was made with reference to the 1960 census, according to which the ideal or normal ratio for House membership was one Representative for every 17,860 people and one Senator for every 51,028 people. Bearing in mind the Board's approach to the problem, it was inevitable that the plan which the Board produced involved variations in both directions from the ideal ratios for both Houses. While a number of the variations are substantial, none of them exceeds the 15 percent suggested as tolerable in *Toombs v. Fortson,* N. D. Ga., 241 F. Supp. 65, and *Wesberry v. Vandiver,* N. D. Ga., 206 F. Supp. 276, rev'd. on other grounds, *Wesberry v. Vandiver,* 376 U. S. 1.

In attacking the plan the objecting parties contend generally that in creating multi-county and multi-member districts for both Houses the Board acted unconstitutionally, and that the Board's adherence to county lines in creating the respective districts created such disparities of population among the several dis-

tricts as to violate the "one man, one vote" philosophy of the Reapportionment Cases.

It is further contended by the intervenors that the inclusion of smaller counties, such as Cleburne, Crawford, and Van Buren, in districts containing one or more counties of large populations in effect disenfranchises the voters in the smaller counties and unconstitutionally discriminates against those voters.

The Board denies that any of those contentions possess merit.

At the outset of discussion we will say that it is not our function to effect revisions of the plan when such revisions are unnecessary to satisfy constitutional requirements. We further recognize that the question is not whether the plan adopted by the Board is the best that could be devised. There are indeed instances where a district is not comprised of the most compatible counties, based on their diverse geographic and political compositions. In fact, it defies imagination to contrive a scheme that would meet with everyone's satisfaction. Moreover, the constitutionality of the plan cannot be measured fairly by reference to isolated, individual examples. We must determine whether the Board has in good faith fashioned a reapportionment plan complying with the rulings of the United States Supreme Court. The Board was faced with a difficult task due to the unequal distribution of the population of the State, in that a solution to one problem might well have given rise to others of equal or greater seriousness. In performing its task, the Board was entitled to some measure of administrative or legislative discretion, and in the permissible area of

such discretion we will not substitute our judgment for that of the Board.

In appraising the plan it is our duty to look at it as a whole, to consider its rationality, its historical basis, and its overall conformity or lack of conformity to the requirement that each Representative and each Senator must represent substantially the same number of people so that the vote of each voter will ultimately have approximately the same weight as that of every other voter.

We first consider and reject the contention that the plan is automatically unconstitutional because both Houses will consist in part of multi-member and multi-county districts. We see nothing unconstitutional about a legislative district, whether a House district or a Senate district, consisting of more than one county, or about a county containing more than one legislative district. Cf. *Fortson v. Dorsey,* 379 U.S. 433. In *Simms v. Reynolds,* supra, 377 U.S. at 577, the Court recognized that at least one house may have some multi-member districts; and we do not think that such recognition implies a requirement that the other house *must* have only single-member districts. If the apportionment of the membership of a bi-cameral State legislature meets other constitutional tests, we do not think that it is rendered invalid merely because there are multi-member and multi-county districts in both houses. We recognize that this question is not free from doubt, and, of course, if the Supreme Court of the United States holds ultimately that at least one house must be made up of single member districts, the Arkansas Legislature will have to be reapportioned

again. But, we are not prepared to anticipate such a holding.

In behalf of Cleburne, Crawford, and Van Buren Counties, as individual counties, it is argued that citizens of those counties will probably be unable to elect representatives who reside therein, and that Faulkner County will monopolize both seats in the 14th District, and that Sebastian County will monopolize the five seats in the 12th District.

Those arguments are fallacious. The Constitution does not require that a person residing in a particular county of a multi-county district be represented in the Legislature by a citizen of his own county. Under the Board's plan the votes in a multi-county district are cast on a district-wide basis, and election is determined by a district-wide majority or plurality. The representatives chosen to represent the district will represent all of the people of the district. And, it is not necessarily true that the voters residing in the more populous counties of a district will customarily or consistently refuse to support candidates from the less populous counties of the district.

We think that the Board was justified rationally and historically in constructing the reapportioned Legislature along county lines and did not act arbitrarily or capriciously in forming the districts themselves.

The most serious objection made to the plan arises from the variations from the ideal House and Senate

ratios of members to people which the plan permits, and it is those variations which have given us our principal concern.

It has been stipulated that the Board considered that the Reapportionment Cases permit a variation of not more than 15 percent above or below the ideal ratios, and it is contended here by the objecting parties that the Board deliberately used the maximum variation supposedly permitted in determining the composition of districts and the number of Representatives or Senators to be allotted to each district. In other words, it is contended that the Board unlawfully employed a "built-in" variation for the purpose of avoiding the requirement of equal representation based on population. Cf. *Toombs v. Fortson*, supra, 241 F. Supp. at 70.

We do not think that the Board's action can fairly be so appraised. When the Board decided to respect the integrity of the counties and to lay out the districts with reference to county lines, variations in district populations followed automatically. It must have been obvious to the Board that population variations between and among the counties of Arkansas would be reflected in deviations in both directions from the ideal ratios in the respective districts, and it appears to us that the Board simply felt that the variations were tolerable if they did not exceed 15 percent either way.

It is quite true, as counsel point out, that a variation of not more than 15 percent or any other variation is not permitted automatically by the 14th Amend-

ment. But, the authorities do suggest that a deviation of not more than 15 percent either way is tolerable, and in general the deviations involved in the plan under consideration are substantially less than 15 percent.

In general, the Senate deviations are not great, and in only one District is the 15 percent figure approached closely. In four of the 25 Districts the deviation from the ideal is less than one percent. The average variation in the 13 over represented Senate Districts is 4.97 percent, and the average variation in the 12 under represented Districts in that House is 4.61 percent. The spread between those average variations is 9.58 percent.

Deviations from the ideal ratio are somewhat more marked in the House than in the Senate. In the House the average over representation is about 6.84 percent, and the average under representation is about 6.65 percent. Those variations from the ideal do not greatly exceed either way the Senate variations, but the spread is wider, being 13.49 percent.

We recognize that in both Houses there are individual variations both above and below the averages, but with its imperfections, the plan is certainly an improvement over the apportionment which existed prior to the Board's action, and the Board's plan goes far toward correcting the imbalance in representation of the rural over the urban areas of the State which brought about the litigation in the first place. We are persuaded that the plan should be given our approval.

A decree will be entered approving the plan, overruling the objections of plaintiff thereto, and dismissing the intervenors. Each side will bear its own costs.

Dated this 4 day of November, 1965.

Pat Mehaffy
United States Circuit Judge

J. Smith Henley
United States District Judge

Gordon E. Young
United States District Judge

APPENDIX A

EXHIBIT A

HOUSE OF REPRESENTATIVES

District	County	No. of Representatives	Total Population	Variance
1	Benton	2	36,272	1.5 %
2	Carroll & Madison	1	20,352	13.93%
3	Boone	1	16,116	9.77%
4	Marion, Searcy & Pope	2	35,342	1.07%
5	Baxter, Fulton	1	16,600	7.07%
6	Randolhp, Clay	2	33,778	5.42%
7	Washington	3	55,797	4.11%
8	Newton, Johnson	1	18,384	2.91%
9	Stone, Izard, Sharp	1	19,379	8.49%
10	Lawrence	1	17,267	3.34%
11	Greene, Craighead	4	72,501	1.46%
12	Crawford, Sebastian	5	88,003	1.47%
13	Franklin, Logan, Yell	2	38,110	6.67%
14	Van Buren, Cleburne, Faulkner	2	40,590	13.6 %
15	Independence	1	20,048	12.22%

EXHIBIT A (Continued)

District	County	No. of Representatives	Total Population	Variance
16	Jackson, Woodruff	2	36,797	2.99%
17	Poinsett	2	30,834	13.69%
18	Mississippi	4	70,174	1.79%
19	Scott, Polk	1	19,278	7.91%
20	Montgomery, Garland	3	52,067	2.84%
21	Conway	1	15,430	13.6 %
22	Perry, Pulaski	13	247,907	6.75%
23	White, Lonoke	3	57,296	6.91%
24	Prairie, Arkansas	2	33,870	5.19%
25	Monroe	1	17,327	3.00%
26	Cross	1	19,551	9.44%
27	St. Francis	2	33,303	6.78%
28	Crittenden	3	47,564	11.24%
29	Lee, Phillips	4	64,998	9.03%
30	Sevier, Little River	1	19,367	8.41%
31	Howard, Pike	1	18,742	4.91%
32	Saline, Hot Spring	3	50,849	5.11%
33	Grant, Jefferson	5	89,669	.39%
34	Hempstead	1	19,661	10.05%

EXHIBIT A (Continued)

District	County	No. of Representatives	Total Population	Variance
35	Clark, Nevada	2	31,650	11.41%
36	Dallas, Cleveland	1	17,466	2.22%
37	Lincoln, Desha	2	35,217	1.42%
38	Miller	2	31,686	11.31%
39	Lafayette, Columbia	2	37,430	4.76%
40	Ouachita	2	31,641	11.43%
41	Calhoun, Union	3	55,509	3.57%
42	Bradley, Ashley	2	38,249	7.05%
43	Drew	1	15,213	14.83%
44	Chicot	1	18,990	6.39%

EXHIBIT B

SENATE

District	County	No. of Senators	Total Population	Variance
1	Benton, Carroll	1	47,556	6.81%
2	Washington	1	55,797	9.32%
3	Madison, Crawford, Franklin, Johnson	1	53,020	3.88%
4	Sebastian, Scott, Logan, Polk	2	101,920	.14%
5	Howard, Sevier, Hempstead, Nevada	1	51,395	.07%
6	Pike, Clark, Dallas, Grant	1	47,630	6.67%
7	Montgomery, Garland	1	52,067	2.02%
8	Pope, Yell, Conway, Perry	1	53,474	4.77%
9	Boone, Marion, Baxter, Newton, Searcy	1	46,187	9.5 %
10	Saline, Hot Spring	1	50,849	.36%
11	Little River, Miller, Lafayette	1	51,927	1.74%
12	Ouachita, Columbia	1	58,041	13.72%

EXHIBIT B (Continued)

District	County	No. of Senators	Total Population	Variance
13	Union	1	49,518	2.97%
14	Stone, Van Buren, Cleburne, Faulkner	1	46,884	8.13%
15	Fulton, Izard, Sharp, Randolph Lawrence	1	49,529	2.95%
16	Independence, White	1	52,793	3.44%
17	Jackson, Woodruff, Prairie	1	47,312	7.29%
18	Pulaski, Lonoke	5	267,531	4.83%
19	Cleveland, Calhoun, Bradley, Ashley	1	51,184	.28%
20	Jefferson, Lincoln	2	95,820	6.12%
21	Monroe, Lee, Arkansas, Phillips	2	105,680	3.53%
22	Desha, Drew, Chicot	1	54,973	7.71%
23	Clay, Greene	1	46,456	8.97%
24	Craighead, Mississippi, Poinsett	3	148,311	3.12%
25	Cross, Crittenden, St. Francis	2	100,418	1.62%

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHN YANCEY ..... *Plaintiff*

v. LR-64-C-96

ORVAL E. FAUBUS, GOVERNOR,
KELLY BRYANT, SECRETARY OF STATE,
BRUCE BENNETT, ATTORNEY GENERAL,
"THE BOARD OF APPORTIONMENT",
NATHAN GORDON, LT. GOVERNOR OF
THE STATE OF ARKANSAS AND PRESIDENT
OF THE SENATE AND J. H. COTTRELL, JR.,
SPEAKER OF THE HOUSE OF REPRESENTATIVES
OF THE STATE OF ARKANSAS ..... *Defendants*

DECREE

Pursuant to memorandum opinion this day filed herein, IT IS CONSIDERED, ORDERED, ADJUDGED and DECREED that the plan of reapportionment of the membership of the Senate and House of Representatives of the General Assembly of the State of Arkansas submitted by defendants as members of the Board of Apportionment established by Amendment 45 to the Constitution of the State of Arkansas, be, and it hereby is, approved and is to be put into effect not later than the General Election to be held in November, 1966, that is to say that members of both Houses of the 66th General Assembly of the

State of Arkansas must be elected in conformity with the Board's plan.

Objections of plaintiff to the plan are overruled and the interventions filed herein and dismissed. Each side is to bear its own costs.

/s/ Pat Mehaffy
United States Circuit Judge

/s/ J. Smith Henley
United States District Judge

/s/ Gordon E. Young
United States District Judge

APPENDIX E

United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

APPENDIX F

Federal Statutes

28 U.S.C.A. 1253 Supreme Court — Jurisdiction

§ 1253. *Direct appeals from decisions of three-judge courts*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926.

28 U.S.C.A. 1343 District Courts — Jurisdiction

§ 1343. *Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954,

c. 1263, § 43, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, §121, 71 Stat, 637.

28 U.S.C.A. 2201 Declaratory Judgments

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63, Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L 85-508, § 12(p), 72 Stat. 349.

28 U.S.C.A. 2202 Declaratory Judgments — Further Relief

§ 2202. *Further relief*

Further necessary or proper relief based on a declatory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

28 U.S.C.A. 2281 Three Judge Courts

§ 2281. *Injunction against enforcement of State statute; three judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

42 U.S.C.A. 1983 Civil Rights

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

42 U.S.C.A. 1988 Civil Rights

§ 1988. *Proceedings in vindication of civil rights*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in con-

formity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. R. S. § 722.

APPENDIX G

Arkansas Constitution

Amendment Forty-five

§ 1. *Board of apportionment created — Powers and duties.*

A Board to be known as "The Board of Apportionment," consisting of the Governor (who shall be Chairman), the Secretary of State and the Attorney General is hereby created and it shall be its imperative duty to make apportionment of representatives in accordance with the provisions hereof; the action of a majority in each instance shall be deemed the action of said board.

§ 2. *One hundred members in house of representatives — Apportionment.*

The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the population of said counties as shown by the Federal census next preceeding any apportionment hereunder.

§ 3. *Senatorial districts — Thirty-five members of senate.*

The Senate shall consist of thirty-five members.

Senatorial districts as now constituted and existing, as heretofore directed by the Supreme Court of Arkansas in the case of *Pickens v. Board of Apportionment,* 220 Ark. 145, 246 S. W. 2d 556, shall remain the same and the number of Senators from the districts shall not be changed.

§ 4. *Duties of board of apportionment.*

On or before February 1, immediately following each Federal census, said Board shall reapportion the State for Representatives, and in each instance said Board shall file its report with the Secretary of State, setting forth (a) the basis of population adopted for representatives; (b) the number of representatives assigned to each county; whereup after 30 days from such filing date, the apportionment thus made shall become effective unless proceedings for revision be instituted in the Supreme Court within said period.

§ 5. *Mandamus to compel board of apportionment to act.*

Original jurisdiction (to be exercised on application of any citizens and taxpayers) is hereby vested in the Supreme Court of this State (a) to compel (by mandamus or otherwise) the Board to perform its duties as here directed and (b) to revise any arbitrary action of or abuse of discretion by the Board in making such apportionment; provided any such application for revision shall be filed with said Court within 30 days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the Court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Sec-

retary of State and thereupon be and become a substitute for the apportionment made by the Board.

§ 6. *Election of senators and representatives.*

At the next general election for the State and County officers ensuing after any such apportionment, Representatives shall be elected in accordance therewith, Senators shall be elected henceforth according to the apportionment now existing, and their respective terms of office shall begin on January 1 next following. Senators shall be elected for a term of four years at the expiration of their present terms of office.

942
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Office-Supreme Court, U.S.
FILED
JAN 24 1966
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

No. 942
October Term, 1965

~~THE CRAWFORD COUNTY BAR ASSOCIATION, BY FINES F. BATCHELOR, JR., PRESIDENT DAVID O. PARTAIN, VICE-PRESIDENT, AND N. D. EDWARDS, SECRETARY-TREASURER, AND~~ CECIL L. ALEXANDER ..... *Appellants and Intervenors*

v.

ORVAL E. FAUBUS, GOVERNOR, KELLY BRYANT, SECRETARY OF STATE, AND BRUCE BENNETT, ATTORNEY GENERAL, BEING THE MEMBERS OF "THE BOARD OF APPORTIONMENT" OF THE STATE OF ARKANSAS ..... *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT CECIL L. ALEXANDER

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PARAGON PRINTING CO., LITTLE ROCK

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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....
October Term 1965

THE CRAWFORD COUNTY BAR ASSOCIATION, BY FINES F. BATCHELOR, JR., PRESIDENT DAVID O. PARTAIN, VICE-PRESIDENT, AND N. D. EDWARDS, SECRETARY-TREASURER; AND CECIL L. ALEXANDER ..... *Appellants and Intervenors*

v.

ORVAL E. FAUBUS, GOVERNOR, KELLY BRYANT, SECRETARY OF STATE, AND BRUCE BENNETT, ATTORNEY GENERAL, BEING THE MEMBERS OF "THE BOARD OF APPORTIONMENT" OF THE STATE OF ARKANSAS ..... *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT CECIL L. ALEXANDER

Appellant, Cecil L. Alexander, appeals from the judgment of the United States District Court for the Eastern District of Arkansas, entered on November 4, 1965, approving the plan of reapportionment of the membership of the Senate and House of Representatives of

the General Assembly of the State of Arkansas submitted by Appellees, the Board of Apportionment of the State of Arkansas, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of Arkansas, Western Division, holding the prior Arkansas Apportionment plan unconstitutional, is reported in 238 F. Supp. 290. Following the decision, The Board of Apportionment submitted to the District Court the apportionment plan at issue in this appeal. The decision of the District Court approving this latter plan is not reported. A copy of the opinion is attached hereto as Appendix A. The judgment is to be found in Appendix B.

JURISDICTION

This suit was brought to attack a plan of apportionment of the Arkansas Legislature alleged to deprive the citizens of the State of equal protection of the laws in violation of the Fourteenth Amendment. Jurisdiction of the District Court accordingly is based upon 42 U.S.C. §§1983, 1988, and 28 U.S.C. §1343(3). As the complaint challenged the constitutionality of a State constitutional provision and prayed for an injunction against the continued enforcement of that provision, a statutory court of three judges was convened pursuant to 28 U.S.C. §§2281, 2284(1).

The opinion of the court below, dated and filed November 4, 1965, held that the plan of apportionment proposed by The Board of Apportionment to replace the prior

unconstitutional legislative districts meets constitutional standards. A judgment approving the plan (to be put into effect not later than the November, 1966, General Election) was also entered on November 4, 1965.

Notice of appeal was filed by Appellant in the District Court November 26, 1963. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253, 2101(a). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Baker* v. *Carr*, 369 U.S. 186 (1962).

QUESTIONS PRESENTED

In arriving at its apportionment plan, The Board of Apportionment proceeded upon the assumption that so long at a district of contiguous counties did not vary by more than 15% from the ideal size, no other factors need be taken into consideration.

May The Board of Apportionment constitutionally ignore all other factors so long as no one district varies from the ideal size by more than 15%?

Is the use of a mathmatical formula, to the exclusion of other relevant factors, constitutionally permsisible in framing a plan of legislative apportion?

[This statement of the Questions Presented restates the substance of Questions II, IV, and IX of the Notice of Appeal. Sup. Ct. R. 15(1)(c)(2).]

STATUTES INVOLVED

This appeal does not question the validity of any statute or treaty.

STATEMENT

This action was brought on July 15, 1964, one month after the Supreme Court's decisions in the "Reapportionment Cases," to attack the constitutionality of the then existing apportionment of the Legislature of the State of Arkansas. The defendants in the suit were the Governor, the Secretary of State, and the Attorney General of the State, as these State Officials comprise "The Board of Apportionment" created by Section 1 of Amendment 45 to the Arkansas Constitution.

The Board of Apportionment created by Amendment 45 was charged with making decennial reapportionments of the Arkansas Senate and House of Representatives, but their reapportionment was confined within limits set by other provisions of Amendment 45. In general, each of the seventy-five counties had been apportioned at least one of the authorized one-hundred members of the House of Representatives, while the district areas and their representation in the Senate were frozen without respect to future population shifts. The then existing plan of apportionment clearly failed to meet the tests announced in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and its companion cases. The District Court so held on January 28, 1965. *Yancey* v. *Faubus*, 238 F. Supp. 290 (1965).

The District Court directed The Board of Apportionment to file a valid scheme of apportionment by June 15, 1965. The decision that certain portions of Amendment 45 to the Arkansas Constitution were, federally speaking, unconstitutional, raised questions as to the validity of the remaining provisions and as to the very existance of The Board of Apportionment. These questions were answered by the Arkansas Supreme Court in *Faubus* v. *Kinney*, 239 Ark. 443, 389 S.W. 2d 887 (1965).

The Arkansas Supreme Court held that the provisions of Amendment 45 establishing The Board of Apportionment and providing for 100 members in the House of Representatives and 35 members in the Senate were distinct and separate provisions from those portions held federally unconstitutional, and were therefore of continuing validity. It specifically held that The Board of Apportionment was the proper state authority to undertake the reapportionment ordered by the Federal District Court.

After receiving one extension of time, The Board of Apportionment filed with the District Court on July 15, 1965, its plan revising the State's legislative apportionment. This is the plan (ultimately approved by the District Court on November 4, 1965) which is the subject of this appeal.

The plan filed by The Board of Apportionment provides for the division of the 75 counties into 44 House of Representative districts. Each district is to be composed of one or more entire counties, with the 100 representatives being distributed among the 44 districts on the basis, roughly (as will be explained), of one representative to every 17,860 persons.

The plan for the Senate calls for the division of the 75 counties into 25 districts, again composed of one or more entire counties, with the 35 senators being distributed among these districts on the basis, again roughly, of one senator to every 51,028 persons.

The complete plan of reapportionment may be found in Appendix A, at the conclusion of the District Court's Opinion.

It should be stated that at all times in this case all parties have used a rounded 1960 census population for the State of Arkansas of 1,786,000 persons. This figure does not purport to represent the number of registered voters or even the number of eligible voters. In dividing the State's 75 counties into House of Representative or Senate districts, The Board of Apportionment used the "natural" or "ideal" ratio set out in *Yancey* v. *Faubus, supra,* [1 to every 51,028 persons for the Senate; 1 to every 17,860 persons for the House], but allowed a variance per district from the "natural" or "ideal" ratio of a plus or minus 15%.

The filed apportionment plan was attacked by the original plaintiff, John Yancey, and also by the Crawford County Bar Association, which was allowed to intervene on behalf of the people of Crawford County.

Also allowed to intervene were Appellant Cecil L. Alexander, the present duly elected Member of the Arkansas House of Representatives from Cleburne County, and Mac Evans, the Representative from adjoining Van Buren County, appearing, respectively, on behalf of the people of their counties.

The Board of Apportionment's plan was approved by the District Court on November 4, 1965, and the plan was ordered into effect not later than the General Election to be held in November, 1966. Notice of Appeal was filed on behalf of the Crawford County Bar Association and Cecil L. Alexander on November 26, 1965. As the issues argued on appeal by the Crawford County Bar Association and by Cecil L. Alexander are not the same, separate jurisdictional statements have been filed by each Appellant.

THE QUESTIONS ARE SUBSTANTIAL

"One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'. *Lane* v. *Wilson,* 307 U.S. 268, 275; *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342."

Reynolds v. *Sims,* 377 U.S. 533 (1964), at 563.

I

The great number of suits to reapportion state legislatures which were filed following the decision of this court in *Baker* v. *Carr,* 369 U.S. 186 (1962) have substantially corrected the under-representation of urban areas which was such a conspicuous feature of most pre-*Baker* apportionments.

Even the briefest comparison of the apportionment plan attacked in this appeal with the prior Arkansas plan demonstrates the truth of the District Court's statement that " . . . the plan is certainly an improvement over the apportionment which existed prior to the Board's action, and . . . goes far toward correcting the imbalance in representation of the rural over the urban areas of the State which brought about the litigation in the first place" (Record 80-81).

It may also be agreed, as the District Court stated, that the apportionment of the Arkansas Senate comes very close to matching the ideal representation ratio, with relatively minor deviations from district to district (Record 80).

What then are Appellant Alexander's objections to this new plan of apportionment? What is allegedly

wrong with the plan of apportionment of the Arkansas House of Representatives?

II

A brief description of the political womb in which this plan of apportionment was conceived and nurtured will help explain the basis for the legal objections raised by Appellant Alexander on behalf of the residents of his district, Cleburne County.

Though the Board of Apportionment presented no evidence to the District Court to explain its plan of apportionment, its members were widely quoted, when the plan was submitted to the District Court as being dissatisfied themselves with the plan:

> Mr. Faubus said some of the districts were inequitably apportioned, . . .
>
> [Attorney General] Bennett agreed that in some cases voters will be disenfranchised by the plan.
>
> Arkansas Gazette, Page 1B, Thursday, July 15, 1965 (Appendix E).

Obviously some of this "dissatisfaction" was feigned, but soon other reports appeared which indicated that not all districts were formed in consideration of those impartial factors approved by this Court. It began to appear that some Districts were formed to accommodate special political interests:

> Representative Paul Van Dalsen said Thursday that Perry County was put in the same House

district as Pulaski County in the reapportionment of the Arkansas legislature at his request.

Arkansas Gazette, Page 1A, Friday, July 16, 1965 (Appendix F).

We do know that Sheriff Marlin Hawkins of Conway County didn't want his representative, Loid Sadler, running over in larger Faulkner County.

George Douthit, Backstage at the Capitol, Arkansas Democrat, Page 1D, Sunday, August 8, 1965 (Appendix G).

To say the least, such public pronouncements by the members of The Board of Apportionment and such interviews and reports published by reporters regularly covering the Arkansas political scene aroused Appellant's interest, for his County, Cleburne, had been placed in House of Representatives District Number 14 with Van Buren County and the aforementioned Faulkner County.

The political power of Sheriff Marlin Hawkins in Conway County, and the deferential respect paid his "wishes" at the State Capitol have been given national attention more than once. This is Conway County and its Sheriff, Marlin Hawkins, as reported in The Atlantic Monthly by one Roy Reed ("How to Lynch A Newspaper", Vol. 214, Pages 59-63 (November, 1964) at 59-60):

Three well-known Arkansas political leaders, all friends of the administration of Governor Orval E. Faubus, are among the overseers of the Conway County machine. Loid Sadler, a Morrilton busi-

nessman, is Conway County's representative in the state legislature. Nathan Gordon of Morrilton is a lawyer, a World War II hero, and the lieutenant governor of the state. Paul Van Dalsem of Perryville represents neighboring Perry County in the state House of Representatives and is generally considered the boss of the legislature. He is connected with the Conway County machine through friendship and business.

Sheriff Marlin Hawkins is the administrative head of the Conway County machine. When Arkansas reformers need an unsightly example, they mention the sheriff of Conway County. However, it probably would have to be said that Sheriff Hawkins, like Shaw's Lucifer, is not so black as he is painted. . . . In short, Sheriff Hawkins does what needs to be done to take care of his home organization. Since the county's chief export is votes, the sheriff has had to deal with first one and then another of the outside political forces that need votes. During one period, he pledged and faithfully delivered the vote of Conway County to a series of liberal causes, including the re-election of the famous moderate, former Congressman Brooks Hays. In those days, the liberals described the sheriff — with grins and sidelong glances — as good old Marlin. Eventually it became desirable for him to deliver the Conway County vote to the race-baiters and cotton-gin Babbitts of the Faubus organization. After that the liberals described Sheriff Hawkins as a threat to the democratic process.

One of the greatest variances from the ideal ratio of one representative for each 17,860 people in the plan

of apportionment submitted by the Board of Apportionment occurs with respect to Sheriff Hawkins' Conway County. This county, by itself, is House District 21. Its ratio varies by a minus 13.6%, for it has only 15,430 persons, who therefore are over represented (Record 82).

Neighboring House District 14, composed of Faulkner, Cleburne, and Van Buren counties, however, are *under represented* by the same degree, 13.6% (Record 82).

Could these large variances be reduced? Yes. A House District composed of Conway County and Faulkner County, both on the Arkansas River, would vary from the ideal ratio by a plus 11.2% and have 2 representatives. If Cleburne County and Van Buren County, within which lies the new Greers Ferry federal reservoir, were paired in a House District, the variance would be only a minus 8.8%, with one representative. A total variance range of 27.2% under the present plan would be reduced to 20%.

Moreover, all the evidence in the record shows that these two proposed districts, if formed, would have the community of interest, of problems, of socio-economic status, and of political and racial factors which the decisions of this Court and of the better considered District Court cases require.

For example, the evidence introduced shows that Conway and Faulkner both border the Arkansas River, are concerned with the development of navigation on that river and the economic opportunities incident to such navigation, are areas of recent industrial growth and expansion, are areas actively trying to attract even more industrial plants (ex: Conway County is the site of a new paper mill), and are, agriculturally, areas for row-crops.

On the other hand, Cleburne and Van Buren Counties have little industry and their agriculture tends toward dairy farming and feed crops. Some hard wood forestry is carried on, but the largest and most promising economic project for these two counties is their joint development of tourism on the new Greers Ferry Lake, which is entirely within their boundaries. The record shows several example of such joint projects already undertaken. [Record Exhibits C3, C4. And see Exhibit C7, (Tourist and Recreation Potential, Arkansas Ozark Region, Area Redevelopment Administration, U. S. Department of Commerce, August, 1963)].

In short, the record documentation of the economic, political, financial, and political interests and problems shows without contradiction that these interests and problems are best paired when Conway and Faulkner Counties are placed in one House District, and Cleburne and Van Buren Counties in another.

III

Certain other unusual features of this plan of apportionment may be briefly noted. Bradley County and Ashley County together form House District 42, although separated by a river which is bridged only by a railroad trestle (Record Exhibit C1), while only dirt roads and three ferries (again no bridges) connect Stone County with the rest of House District 9 (Record Exhibit C1; Appendix C).

The underlying economic and political interests served by the many groupings of a "river" county with "hill" counties (topograph map, Record Exhibit C1), pitting the larger urban areas against the smaller, poorer areas on economic issues, but allying urban and hill area Whites

against Negroes (who form a very minor portion of the population outside of the river and delta areas) on racial matters is a consideration outside the scope of a Jurisdictional Statement. Nevertheless, it is a matter necessarily passed upon and approved by the District Court's acceptance of the plan submitted by The Board of Apportionment.

Indeed, as the District Court itself found from the the record:

> There are indeed instances where a district is not comprised of the most compatible counties, based on their diverse geographic and political composition (Record 76).

IV

The political, practical objections of Appellant Alexander now begin to merge with his legal objections.

Cleburne, Van Buren, and Faulkner Counties, together with Stone County (population 6,294), have since 1952 comprised Senate District 14, which is to be continued under the new plan of apportionment (Appendix D). Since 1952 no person has been elected a State Senator from this District who has not been a resident of Faulkner County (Record Exhibit C10).

Now Cleburne, Van Buren, and Faulkner Counties are to be placed together in House District 14, with two representatives (Record 82).

Adopting the words of Mr. Justice Harlan in *Baker* v. *Carr*, 369 U.S. 186 (1962), dissenting at page 344, to the Board's proposed Senate and House Districts 14, the

"sophisticated" discrimination inherent in the present plan is made plain:

> It may, of course, be true that the floterial representative's function is to represent the whole district. But can it be gainsaid that as long as elections within the district are decided not by a county-unit system, in which each county casts one vote, but by adding the total number of individual votes cast for each candidate, the concern of the elected representatives will primarily be with the most populous counties in the district?

In truth, Senate and House Districts 14 isolate and disfranchise distinct "political elements of the voting population," having common interests and common problems, just as effectively as did the Tuskegee gerrymander struck down in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Indeed, the case presents almost the reverse question of that raised by *Gray* v. *Sanders*, 372 U.S. 368 (1963) (striking down a plan of discrimination against urban voters within a single district), for here urban Faulkner County, which has over one-half the population in Senate District 14 and three-fifths of the population in House District 14, would dominate rural Cleburne and Van Buren Countiees in both Districts, and Stone County in the Senate District.

This is not an attack upon floterial districts per se. This is an attack upon the use of a pseudo-floterial district to effectively disfranchise distinct political and economic interests. Appellant Alexander believes that the record in this case and the findings of the District Court bring this case within the area not reached by this Court in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) (at 439):

> It might well be that, designedly or otherwise, a multimember constituency apportionment scheme.

under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us.

V

As has been pointed out, Cleburne and Van Buren Counties cannot together be considered as a district which, independently, would not be entitled to additional representation: Indeed, if they were to be composed into one district, with Faulkner and Conway Counties being placed together in another district, the approved plan of apportionment would be materially improved. Thus their appendage to Faulkner County in House District 14 cannot be viewed as the creation of a floterial district. See *Davis* v. *Mann*, 377 U.S. 678 (1964), at 686, f.n. 2.

Two constitutional grounds are urged by this appeal against the inclusion of Cleburne and Van Buren Counties with Faulkner County in House District 14 when they are also bracketed with Faulkner County in Senate District 14. As alleged in the "Questions Presented":

(A) The Board of Apportionment relied upon a supposed tolerance of 15%, plus or minus, from the ideal ratio in framing its plan; and

(B) By its use of this supposed tolerance, The Board of Apportionment excluded other relevant factors in framing its plan.

These two constitutional grounds will be considered in inverse order.

First, we shall consider a most important and constitutionally relevant factor ignored by The Board of Apportionment in framing its plan.

Second, we shall consider whether or not the record shows The Board of Apportionment to have relied solely upon the supposed 15% tolerance for "one man, one vote" districts in arriving at its own plan.

VI

> And the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.
>
> *Reynolds* v. *Sims,* 377 U.S. 533 (1964), at 555.

If multi-county, multi-representative districts are constitutionally permitted in both Houses of a bicamerial legislature, as the District Court held (Record 77-78) (a point litigated by another appeal of the District Court's decree), what constitutional standards prevent the "debasement or dilution of the weight of a citizen's vote" by a sophisticated plan of including small voting units with a larger voting unit in the same legislative district?

While this precise question has not yet been answered by this Court, the answer is clearly indicated in previous opinions:

> And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house.
>
> *Reynolds* v. *Sims, supra,* at 577.

> See *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 673, where we discussed the need for considering the apportionment of seats in both houses of a bicameral state legislature in evaluating the constitutionality of a state legislative apportionment scheme, regardless of what matters where raised by the parties and decided by the court below. Consistent with this approach, in determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole. Only after an evaluation of an apportionment plan in its totality can a court determine whether there has been sufficient compliance with the requisites of the Equal Protection Clause. Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation with a minor underrepresentation of that area in the other house. *But, on the other hand, disparities from population based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may therefore render the apportionment scheme at least constitutionally suspect.*
>
> *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964), at 735, f.n. 27 (emphasis supplied).

The balancing of apportionment plans for a bicameral legislature so as to prevent the disfranchisment of one area under both plans, and the need for offsetting the areas in one plan's districts against the area in the other plan's districts, have been extensively considered by a District Court in *Holt* v. *Richardson*, 240 F. Supp. 724, (1965), probable jurisdiction noted 11 October 1965 (Appeal Numbers 318, 323, and 409). That Court held, *supra*. at Pages 729-730:

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must postively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting each house, conjoined, must offer compensating advantages to the voters — not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlaps of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial representative district to the point that the voters therein have a built-in disproportionment representational advantage over any other voters of the State.

If the achievement of this goal is even to be approached, there should not be any monolithic political units of representation in that all-inclusive system of apportionment. Unless, within any single geographically defined political area or unit, there is a *meaningful and substantial difference in the composition of that body of electors therein, whose combined votes elect a senator, from that body whose combined votes elect a member of the house,* then the differing complexions and collective attitudes are lost, the necessary cross checking and resulting balance is absent, and the majorities therein are givin a disproportional monolithic command, not only within the narrow political unit, but also within the legislative bodies. *Such artifically concentrated political power negates any notion of equality of representation for the minorities entrapped therein,* as well as for all other electors of the State outside such a monolithic political unit.

> Compactness and contiguity of the territory are admittedly also factors, but community of interest, community of problems, socio-economic status, political and racial factors — each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more the sum total of all of the districting must result in *substantial equality of meaningful representation* to each and all of the voters of the State (Emphasis supplied).

It is submitted that these decisions point the constitutionally correct path if bicameral legislatures are to have multi-member, multi-representative districts in both Houses. That is to say, whatever might be said in favor of the inclusion of Cleburne County in one multi-member district in which it would be disfranchised, no constitutional standard authorizes the compounding of such a condition by its inclusion in yet a second such district of the same constituent members. Cf., *Holt* v. *Richardson, supra; Lucas* v. *Colorado General Assembly, supra; Reynolds* v. *Sims, supra.*

VII

Does the record actually show that The Board of Apportionment proceeded upon the assumption that so long as a District of contiguous counties did not vary by more than 15% from the ideal size, no other factors need be taken into consideration?

The answer is that the record shows nothing else!

As previously stated, The Board of Apportionment offered no evidence in support of its plan. It did not undertake to explain any "rational factors" which might underlie the deviations from ideal representation contained in its plan.

In its brief filed with the District court, The Board of Apportionment argued only two points: (1) Whether its multi-member apportionment plan was, per se, invalid, which it answered by reference to this court's decision in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) (holding such plans not be be, per se, unconstitutional); and (2) Whether its plan of apportionment exceeded " . . . the amount of variance permissible from the average or ideal district when apportionment is based on population."

This last question was answered by citing *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965), which The Board of Apportionment's brief contended " . . . has indirectly approved a variance of 15% above or below the average district." The Board of Apportionment contended that the variances in its own plan came from its adherence to existing county lines in forming legislative districts.

This is then, the only evidence of a "rational theory" used by The Board of Apportionment in drawing up its plan (Appendix E). The Board of Apportionment did argue orally that it also sought to create the largest number of districts possible and sought to avoid large groupings of counties (Appendix H), and this oral argument is apparently the basis of the District Court's finding that:

> . . . The Board in constituting the new districts undertook to respect county lines and to create districts of convenient size and numerous enough to insure maximum representation to the largest possible number of individual counties (Record 75).

Since seventeen House of Representatives Districts (out of the plan's total of forty-four House Districts)

are one-county districts, of which only ten vary from the ideal ratio by as much as 7%, whereas a total of nineteen House Districts vary by more than 7%, it is clear that the deviations from the ideal ratio contained in the plan do not arise because The Board of Apportionment undertook "to insure maximum representation to the largest possible number of individual counties."

And, contrary to the District Court's findings, the record does not reflect that the insuring of maximum representation to the largest number of individual counties was ever a policy adopted by The Board of Apportionment.

Does *Toombs* v. *Fortson, supra,* "indirectly approve a variance of 15%"?

It is best to consider the exact language of the district court, *supra,* at 70:

> We decline to set a mathematical formula to be followed but do hold that a variance of more than 15% would be difficult, if not impossible, to justify.

That court had previously referred to a 15% variance as the "maximum variance" which *might* be justified as insubstantial, but stated:

> Of course, this does not mean a deliberate built-in variance of this degree [15%] but a good faith effort to meet the average with departure *only where necessary to afford individual representation to as many counties as possible. Toombs* v. *Fortson,* 241 F. Supp. 65 (1965), at 70 (Emphasis supplied).

As the court acknowledged in *Toombs* (at 70), this "maximum variance" was derived from its prior decision,

Wesberry v. *Vandiver*, 206 F. Supp. 276 (1962), at 279, where it had stated the rule in a more restricted fashion:

> It is the position of Plaintiffs that the population of each district should be within a range of ten to fifteen per cent of the average district population based on a division of the number of districts into the total population of the State.[3] (f.n. 3: An adoption of the view of the American Political Science Association.)

It is noteworthy that this formula calls for the division of the number of districts into the total population. The deviation permitted is between district populations, not from a normal representation ratio. The formula is therefore misapplied when used to justify wide variances contained in an apportionment plan for a bicameral legislature. See *League of Neb. Municipalities* v. *Marsh*, 242 F. Supp. 357 (1965), at 359 (As to a unicameral legislature. As the "little federal system" is no longer permitted state legislatures, there is no difference upon this point as to a bicameral legislature in which population based representation is not offset by area representation in the other house).

Moreover, no mathematical standard of permissible variance is recognized by this Court. In *Roman* v. *Sincock*, 377 U.S. 695 (1964) at 710, this court said:

> Our affirmance of the decision below is not meant to indicate approval of the District Court's attempts to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, *and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme*

under the Equal Protection Clause (Emphasis supplied).

The formula adopted by the District Court was explained in *Roman* in footnote 21, page 710, as follows:

> The Court below suggested that population variance ratios smaller than 1.5 to 1 would presumably comport with minimal constitutional requisites, while ratios in excess thereof would necessarily involve deviations from population-based apportionment too extreme to be constitutionally sustained. See 215 F. Supp. at 190.

A 15% variance rule produces a ratio of 1.353 to 1, or very little less than that specifically disapproved by this Court.

VIII

The question is, not whether the plan is an improvement upon existing apportionment, with only those deviations due to a policy of honoring county boundaries, but whether these deviations from equal-vote apportionment have been, or can be, justified.

Assuming only for the purposes of this Jurisdictional Statement that The Board of Apportionment's plan was initially *prima facie* constitutional, did not the burden of going forward with the justification of its plan pass to The Board of Apportionment when obvious and easy changes were suggested to the District Court? Is this not true when the suggested changes would reduce the deviations from equal representation and would form districts having common interests and problems?

Contrasted with the approach of the District Court below is that of the Court in *League of Neb. Municipalities v. Marsh*, 242 F. Supp. 357 (1965), at 360:

> We have considered the opinion in [*Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 730 (1964)] . . . , indicating that a maximum variance of 1.7 to 1 is at least arguably apportioned substantially on a population basis. If there were no redistricting plan other than L.B. 628 which could be devised following county lines, the 1.6 to 1 ratio present thereunder might arguably be permissible . . . .

However, the Court itself devised several plans which had less variance than the submitted plan. It thereupon held the submitted plan "not a constitutionally valid reapportionment plan" when tested on " . . . its totality and the record as a whole."

It is submitted that the approach of the District Court below raises questions of substantial importance in the practical application of the holding in *Reynolds* v. *Sims*, *supra*, and its companion cases.

If a plan of apportionment is to be upheld merely because it does not exceed a 15% "indirectly approved" variance, then the door closed to direct, numerical discrimination is reopened to sophisticated discrimination.

If a plan of apportionment is to be approved which disadvantages counties in both Houses of a bicameral legislature and makes no compensating adjustment in District areas between the two plans, then such areas are deprived of "substantial equality of meaningful representation," *Holt* v. *Richardson*, *supra*, at 730. Is this result constitutionally justified because no one variance exceeds 15%?

While exact arithmetical vote equality is not constitutionally required, certainly nothing less the greatest

achievable qualitative and quantitative equality should be required. When corrections to a plan of apportionment are possible which decrease the arithmetical variances and improve the quantitative factors, can it be said that approval of the uncorrected plan achieves the reapportionment envisioned by this Court in *Reynolds* v. *Sims, supra,* and its companion cases?

These issues deserve the plenary consideration of this Court. The Court has no doubt observed that token compliance with civil rights laws often is but a cloak for the continuance of unconstitutional practices. The observance of a "15% variance rule" should not be allowed to become the token by which voter discrimination is continued.

> And careful judicial scrutiny must of course be given in evaluating state apportionment schemes, *to the character as well as the degree of deviations from a strict population basis.*
>
> *Reynolds* v. *Sims,* 377 U.S. 533 (1964), at 581 (Emphasis supplied).

It is submitted that the District Court below failed to apply just this very test.

Respectfully submitted,

W. B. Brady
Room 100
Pyramid Life Building
Little Rock, Arkansas

Attorney for Appellant
Cecil L. Alexander

POSTSCRIPT

Since this Appellant has raised issues going to the "rational justification," or lack of any "rational justification" (See *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964), at 735, f.n. 27) behind certain variances from the ideal ratio of representation in the Arkansas plan of apportionment, the following portion of the newspaper account of the oral argument before the District Court below may help illumine some corners of the plan not focused upon by the lower court's opinion. The entire newspaper account of the argument is setout in Appendix H.

> "What was the problem then in connection with Van Buren, Cleburne, Faulkner and Conway Counties?" Judge Henley asked [Assistant Attorney-General Farrell Faubus, Attorney for The Board of Apportionment], recalling Brady's argument that it would be better to place Van Buren and Cleburne in one district and Faulkner and Conway in another.
>
> Faubus sidestepped the question.
>
> "It's the Board's contention," he replied, "that if any attack was to be made on any specific groupings of the plan it should have been made in the state Supreme Court * * *. It's our contention that this court must either find the plan constitutional or unconstitutional by constitutional standards and not as to the individual groupings."
>
> *Says Two Questions Are Before Court*
>
> Faubus said he thought the questions to be decided by the three-judge court were (1) whether

multimember House districts are constitutional or whether the House must have 100 districts, and (2) the amount of variation that should be allowed from the ideal population.

Faubus said the 30-day period for petitioning the state Supreme Court to review the plan already had expired.

After the hearing, a newsman asked Faubus why the Board of Apportionment had placed Conway County in a separate district and Faulkner, Cleburne and Van Buren Counties in another one.

"The Board will have to tell you that," Faubus said. "The Board approved the plan."

The younger Faubus was the chief architect of the reapportionment plans for both the House and Senate. He said that except for "three or four minor changes" the plans that the Board submitted to the Court were the ones he prepared.

Faubus was asked whether the decision to place Conway County in a separate district was one of the changes made by the Board. "I'm not commenting on the changes," Faubus said.

Conway County is the political stronghold of Sheriff Marlin Hawkins, close ally of the Faubus administration.

APPENDIX A

In The United States District Court, Eastern District of Arkansas Western Division

John Yancey, ... Plaintiff,

v.

Orval E. Faubus, Governor, Kelly Bryant, Secretary of State, Bruce Bennett, Attorney General, "The Board of Apportionment", ... Defendants.

LR-64-C-96 Memorandum Opinion

Before MEHAFFY, Circuit Judge, HENLEY, Chief District Judge, and YOUNG, District Judge.

PER CURIAM.

On January 28, 1965, this Court held that the scheme of apportionment of the membership of the Arkansas Legislature prescribed by sections 2 and 3 of Amendment 45 to the 1874 Constitution of the State of Arkansas was unconstitutional, and that defendants, members of the Board of Apportionment created by section 1 of that Amendment, would be required to prepare and put into effect a constitutional reapportionment of both the House of Representatives and the Senate. *Yancey* v. *Faubus, E.D. Ark.*, 238 F. Supp. 290. An appropriate decree was entered from which there was no appeal.

On May 17, 1965, the Supreme Court of Arkansas held that as a matter of State constitutional law our decision that the former plan of apportionment was invalid did not affect adversely other sections of the Amend-

ment, and that the Arkansas Legislature would continue to consist of a House of Representatives of 100 members and of a Senate of 35 members, and that the Board of Apportionment had the authority under section 1 of the Amendment to make a valid reapportionment. *Faubus* v. *Kinney*, 239 Ark. 443, 389 S.W. 2d 887. [1]

On July 15 of the current year the Board, in obedience to our decree, filed a plan of reapportionment, which plan is set forth as Appendix A to this opinion. The plan was filed originally with this Court and not with the Secretary of the State of Arkansas as provided by section 4 of Amendment 45. While the written record before us does not expressly reflect that the plan has ever been filed with the Secretary of State, we have been advised informally that it was in fact filed with the Secretary after it was filed here.

In due course the plaintiff, John Yancey, a citizen and qualified elector of Pulaski County, filed objections to the plan. Objections have also been filed by intervenors, Cecil L. Alexander and Mac Evans, members of the Arkansas House of Representatives from Cleburne and Van Buren Counties, respectively, and by representatives of the Crawford County Bar Association. Plaintiff objects generally to the plan; the objections of the intervenors are not only general but also specific to the extent that the plan affects the House representation of Cleburne, Crawford, and Van Buren Counties.

The objections have been heard upon documentary evidence, prehearing briefs, and oral argument.

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[1] In the original proceedings in this Court the Board asserted that it possessed the power to reapportion otherwise than was provided by sections 2 and 3 of Amendment 45, and we took the Board at its word. The matter was discussed in our original opinion. Pages 300-302 of 238 F. Supp.

Under the prior apportionment the State of Arkansas contained 75 House districts, with each of the 75 counties being a district; the Senate was made up of members from 26 districts, and the districts and the membership of the Senate were "frozen" on the basis of distribution of Arkansas' population according to the census of 1950.

Under the new plan the State has 44 House districts and 25 Senate districts. Some of the districts of both types contain more than one county and some of both types are to be represented by more than one member.

The record before us reflects, and we find, that in preparing and submitting its plan the Board undertook in good faith to make a valid reapportionment of the Legislature in conformity with the principles laid down in what we have called the the Reapportionment Cases,[2] which require that both houses of a bi-cameral State legislature be apportioned, insofar as practicable, so that each member of each house represents approximately the same number of people, but permitting limited consideration to be given to other relevant factors such as geography, political subdivisions, and the like. The political philosophy underlying those decisions is frequently referred to by the slogan, "one man, one vote."

We further find that the Board in making its reapportionment gave primary consideration to population, a s[illegible]t was required to do; however, the Board in constituting the new districts undertook to respect county lines and to create districts of convenient sizes and numerous enough to insure maximum representation to the largest possible number of individual counties.

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2 Reynolds *v.* Sims, 377 U.S. 533; W.M.C.A., Inc. *v.* Lomenzo, 377 U.S. 633; Maryland Committee for Fair Elections *v.* Tawes, 377 U.S. 656; Davis *v.* Mann, 377 U.S. 678; Roman *v.* Sincock, 377 U.S. 695; Lucas *v.* Forty-Fourth Colorado General Assembly, 377 U.S. 713.

The reapportionment was made with reference to the 1960 census, according to which the ideal or normal ratio for House membership was one Representative for every 17,860 people and one Senator for every 51,028 people. Bearing in mind the Board's approach to the problem, it was inevitable that the plan which the Board produced involved variations in both directions from the ideal ratios for both Houses. While a number of the variations are substantial, none of them exceeds the 15 percent suggested as tolerable in *Toombs* v. *Fortson,* N.D. Ga., 241 F. Supp. 65, and *Wesberry* v. *Candiver,* N.D. Ga., 206 F. Supp. 276, rev'd. on other grounds, *Westberry* v. *Vandiver,* 376 U.S. 1.

In attacking the plan the objecting parties contend generally that in creating multi-county and multimember districts for both Houses the Board acted unconstitutionally, and that the Board's adherence to county lines in creating the respective districts created such disparities of population among the several districts as to violate the "one man, one vote" philosophy of the Reapportionment Cases.

It is further contended by the intervenors that the inclusion of smaller counties, such as Cleburne, Crawford, and Van Buren, in districts containing one or more counties of large populations in effect disenfranchises the voters in the smaller counties and unconstitutionally discriminates against those voters.

The Board denies that any of those contentions possess merit.

At the outset of discussion we will say that it is not our function to effect revisions of the plan when such revisions are unnecessary to satisfy constitutional re-

quirements. We further recognize that the question is not whether the plan adopted by the Board is the best that could be devised. There are indeed instances where a district is not comprised of the most compatible counties, based on their diverse geographic and political compositions. In fact, it defies imagination to contrive a scheme that would meet with everyone's satisfaction. Moreover, the constitutionality of the plan cannot be meaesured fairly by reference to isolated, individual examples. We must determine whether the Board has in good faith fashioned a reapportionment plan complying with the rulings of the United States Supreme Court. The Board was faced with a difficult task due to the unequal distribution of the population of the State, in that a solution to one problem might well have given rise to others of equal or greater seriousness. In performing its task, the Board was entitled to some measure of administrative or legislative discretion, and in the permissible area of such discretion we will not substitute our judgment for that of the Board.

In appraising the plan it is our duty to look at it as a whole, to consider its rationality, its historical basis, and its overall conformity or lack of conformity to the requirement that each Representative and each Senator must represent substantially the same number of people so that the vote of each voter will ultimately have approximately the same weight as that of every other voter.

We first consider and reject the contention that the plan is automatically unconstitutional because both Houses will consis in part of multi-member and multi-county districts. We see nothing unconstitutional about a legislative district, whether a House district or a Senate district, consisting of more than one county, or about a county containing more than one legislative district. Cf. *Fortson*

v. *Dorsey*, 379 U.S. 433. In *Simms* v. *Reynolds*, *supra*, 377 U.S. at 577, the Court recognized that at least one house may have some multi-member districts; and we do not think that such recognition implies a requirement that the other house *must* have only single-member districts. If the apportionment of the membership of a bi-cameral State legislature meets other constitutional tests, we do not think that it is rendered invalid merely because there are multi-member and multi-county districts in both houses. We recognize that this question is not free from doubt, and, of course, if the Supreme Court of the United States holds ultimately that at least one house must be made up of single member districts, the Arkansas Legislature will have to be reapportioned again. But, we are not prepared to anticipate such a holding.

In behalf of Cleburne, Crawford, and Van Buren Counties, as individual counties, it is argued that citizens of those counties will probably be unable to elect representatives who reside therein, and that Foulkner County will monopolize both seats in the 14th District, and that Sebastian County will monopolize the five seats in the 12th District.

Those arguments are fallacious. The Constitution does not require that a person residing in a particular county of a multi-county district be represented in the Legislature by a citizen of his own county. Under the Board's plan the votes in a multi-county district are cast o na district-wide basis, and election is determined by a district-wide majority or plurality. The representatives chosen to represent the district will represent all of the people of the district. And (it is not necessarily true that the voters residing in the more populous counties of a district will customarily or consistently refuse to sup-

port candidates from the less populous counties of the district.

We think that the Board was justified rationally and historically in constructing the reapportioned Legislature along county lines and did not act arbitrarily or capriciously in forming the districts themselves.

The most serious objection made to the plan arises from the variations from the ideal House and Senate ratios of members to people which the plan permits, and it is those variations which have given us our principal concern.

It has been stipulated that the Board considered that the Reapportionment Cases permit a variation of not more than 15 percent above or below the ideal ratios, and it is contended here by the objecting parties that the Board deliberately used the maximum variation supposedly permitted in determining the composition of districts and the number of Representatives or Senators to be allotted to each district. In other words, it is contended that the Board unlawfully employed a "built-in" variation for the purpose of avoiding the requirement of equal representation based on population. Cf. *Toombs* v. *Fortson, supra,* 241 F. Supp. at 70.

We do not think that the Board's action can fairly be so appraised. When the Board decided to respect the integrity of the counties and to lay out the districts with reference to county lines, variations in district populations followed automatically. It must have been obvious to the Board that population variations between and among the counties of Arkansas would be reflected in deviations in both directions from the ideal ratios in the respective districts, and it appears to us that the Board

simply felt that the variations were tolerable if they did not exceed 15 percent either way.

It is quite true, as counsel point out, that a variation of not more than 15 percent or any other variation is not permitted automatically by the 14th Amendment. But, the authorities do suggest that a deviation of not more than 15 percent either way is tolerable, and in general the deviations involved in the plan under consideration are substantially less than 15 percent.

In general, the Senate deviations are not great, and in only one District is the 15 percent figure approached closely. In four of the 25 Districts the deviation from the ideal is less than one percent. The average variation in the 13 over represented Senate Districts is 4.97 percent, and the average variation in the 12 under represented Districts in that House is 4.61 percent. The spread between those average variations is 9.58 percent.

Deviations from the ideal ratio are somewhat more marked in the House than in the Senate. In the House the average over representation is about 6.84 percent and the average under representation is about 6.65 percent. Those variations from the ideal do not greatly exceed either way the Senate variations, but the spread is wider, being 13.49 percent.

We recognize that in both Houses there are individual variations both above and below the averages, but with its imperfections, the plan is certainly an improvement over the apportionment which existed prior to the Board's action, and the Board's plan goes far toward correcting the imbalance in representation of the rural over the urban areas of the State which brought about the litigation in the first place. We are persuaded that the plan should be given our approval.

A decree will be entered approving the plan, overruling the objections of plaintiff thereto, and dismissing the interventions. Each side will bear its own costs.

Dated this 4 day of November, 1965.

Pat Mehaffy
United States Circuit Judge
J. Smith Henley
United States District Judge
Gordon E. Young
United States District Judge

EXHIBIT A

HOUSE OF REPRESENTATIVES

District	County	No. of Representatives	Total Population	Variance
1	Benton	2	36,272	1.5 %
2	Carroll & Madison	1	20,352	13.93%
3	Boone	1	16,116	9.77%
4	Marion, Searcy & Pope	2	35,342	1.07%
5	Baxter, Fulton	1	16,600	7.07%
6	Randolph, Clay	2	33,778	5.42%
7	Washington	3	55,797	4.11%
8	Newton, Johnson	1	18,384	2.91%
9	Stone, Izard, Sharp	1	19,379	8.49%
10	Lawrence	1	17,267	3,34%
11	Greene, Craighead	4	72,501	1.46%
12	Crawford, Sebastian	5	88,003	1.47%
13	Franklin, Logan, Yell	2	38,110	6.67%
14	Van Buren, Cleburne, Faulkner	2	40,590	13.6 %
15	Independence	1	20,048	12.22%
16	Jackson, Woodruff	2	36,797	2.99%
17	Poinsett	2	30,834	13.69%

18	Mississippi	4	70,174	1.79%
19	Scott, Polk	1	19,278	7.91%
20	Montgomery, Garland	3	52,067	2.84%
21	Conway	1	15,430	13.6 %
22	Perry, Pulaski	13	247,907	6.75%
23	White, Lonoke	3	57,296	6.91%
24	Prairie, Arkansas	2	33,870	5.19%
25	Monroe	1	17,327	3.00%
26	Cross	1	19,551	9.44%
27	St. Francis	2	33,303	6.78%
28	Crittenden	3	47,564	11.24%
29	Lee, Phillips	4	64,998	9.03%
30	Sevier, Little River	1	19,367	8.41%
31	Howard, Pike	1	18,742	4.91%
32	Saline, Hot Spring	3	50,849	5.11%
33	Grant, Jefferson	5	89,669	.39%
34	Hempstead	1	19,661	10.05%
35	Clark, Nevada	2	31,650	11.41%
36	Dallas, Cleveland	1	17,466	2.22%
37	Lincoln, Desha	2	35,217	1,42%
38	Miller	2	31,686	11.31%
39	Lafayette, Columbia	2	37,430	4.76%
40	Ouachita	2	31,641	11.43%

41	Calhoun, Union	3	55,509	3.57%
42	Bradley, Ashley	2	38,249	7.05%
43	Drew	1	15,213	14.83%
44	Chicot	1	18,990	6.39%

EXHIBIT B

SENATE

District	County	No. of Senators	Total Population	Variance
1	Benton, Carroll	1	47,556	6.81%
2	Washington	1	55,797	9.32%
3	Madison, Crawford, Franklin, Johnson	1	53,020	3.88%
4	Sebastian, Scott, Logan, Polk	2	101,920	.14%
5	Howard, Sevier, Hempstead, Nevada	1	51,395	.07%
6	Pike, Clark, Dallas, Grant	1	47,630	6.67%
7	Montgomery, Garland	1	52,067	2.02%
8	Pope, Yell, Conway, Perry	1	53,474	4.77%
9	Boone, Marion, Baxter, Newton, Searcy	1	46,187	9.5 %
10	Saline, Hot Spring	1	50,849	.36%
11	Little River, Miller, Lafayette	1	51,927	1.74%
12	Ouachita, Columbia	1	58,041	13.72%
13	Union	1	49,518	2.97%

14	Stone, Van Buren, Cleburne, Faulkner	1	46,884	8.13%
15	Fulton, Izard, Sharp, Randolph, Lawrence	1	49,529	2.95%
16	Independence, White	1	52,793	3.44%
17	Jackson, Woodruff, Prairie	1	47,312	7.29%
18	Pulaski, Lonoke	5	267,531	4.83%
19	Cleveland, Calhoun, Bradley, Ashley	1	51,184	.28%
20	Jefferson, Lincoln	2	95,820	6.12%
21	Monroe, Lee, Arkansas, Phillips	2	105,680	3.53%
22	Desha, Drew, Chicot	1	54,973	7.71%
23	Clay, Greene	1	46,456	8.97%
24	Craighead, Mississippi, Poinsett	3	148,311	3.12%
25	Cross, Crittenden, St. Francis	2	100,418	1.62%

APPENDIX B

In The United States District Court Eastern District of Arkansas Western Division

John Yancey ..... Plaintiff

v. LR-64-C-96

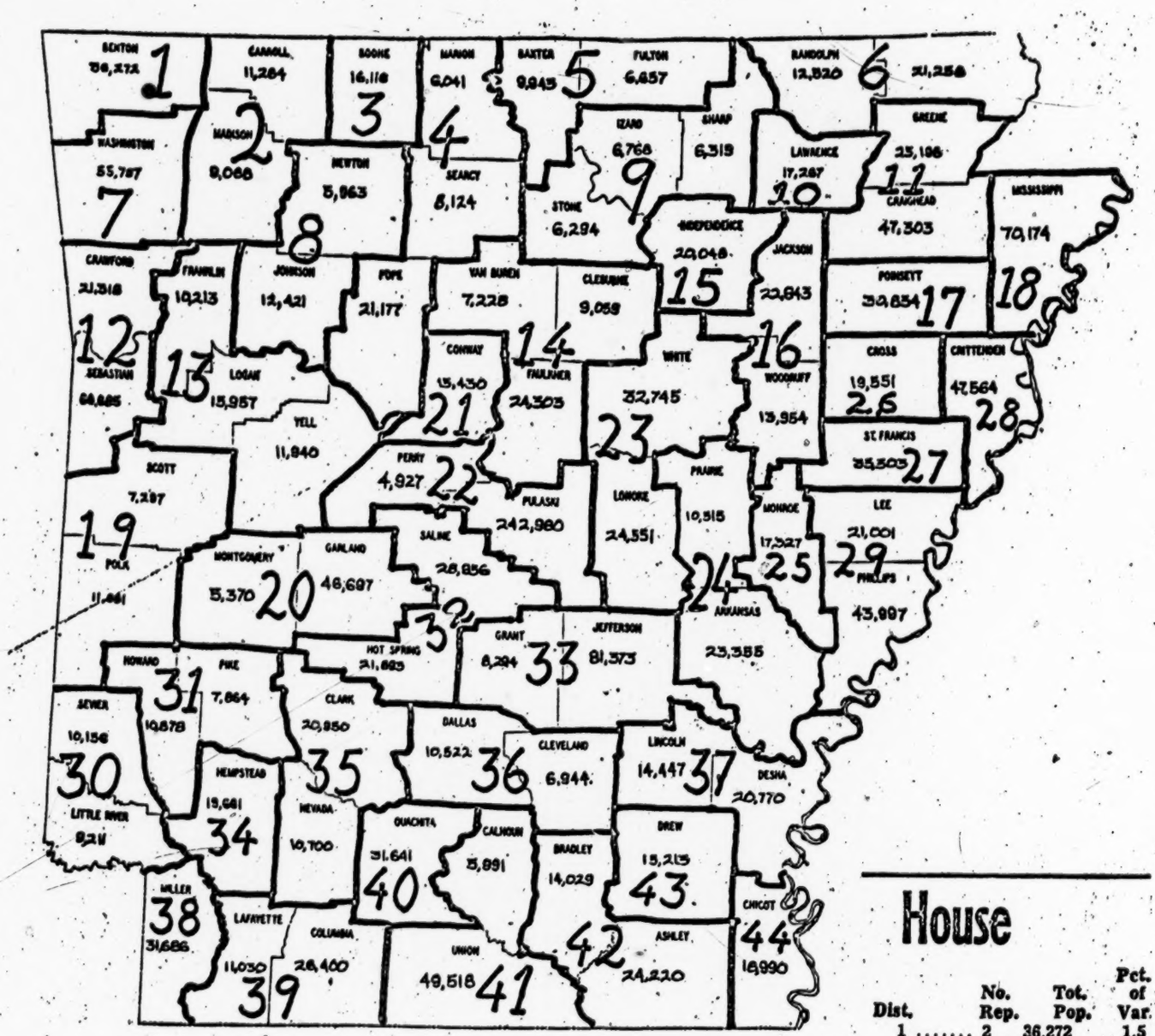
Orval E. Faubus, Governor, Kelly Bryant, Secretary of State, Bruce Bennett, Attorney General, "The Board of Apportionment", Nathan Gordon, Lt. Governor of The State of Arkansas and President of the Senate and J. H. Cottrell, Jr., Speaker of the House of Representatives of the State of Arkansas ..... Defendants

DECREE

Pursuant to memorandum opinion this day filed herein, it is consdireed, ordered, adjudged and decreed that the plan of reapportionment of the membership of the Senate and House of Representatives of the General Assembly of the State of Arkansas submitted by defendants as members of the Board of Apportionment established by Amendment 45 to the Constitution of the State of Arkansas, be, and it hereby is, approved and is to be put into effect not later than the General Election to be held in November, 1966, that is to say that members of both Houses of the 66th General Assembly of the State of Arkansas must be elected in conformity with the Board's plan.

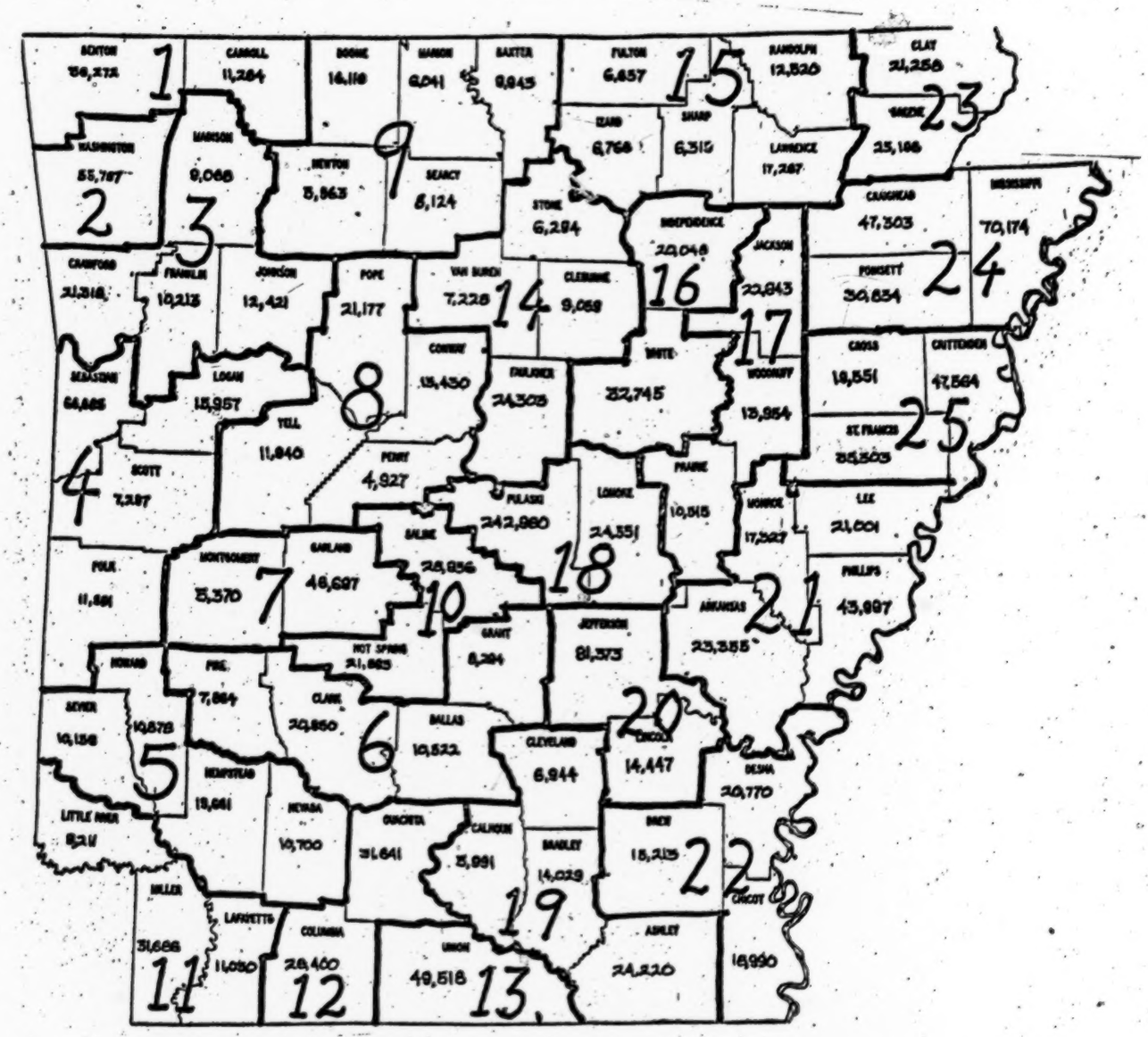
Objections of plaintiff to the plan are overruled, and the interventions filed herein are dismissed. Each side is to bear its own costs.

Pat Mehaffy
United States Circuit Judge
J. Smith Henley
United States District Judge
Gordon E. Young
United States District Judge



House

Dist.	No. Rep.	Tot. Pop.	Pct. of Var.
1	2	36,272	1.5
2	1	20,352	13.93
3	1	16,116	9.77
4	2	35,342	1.07
5	1	16,600	7.07
6	2	33,778	5.42
7	3	55,797	4.11
8	1	18,384	2.91
9	1	19,379	8.49
10	1	17,267	3.34
11	4	72,501	1.46
12	5	88,003	1.47
13	2	38,110	6.67
14	2	40,590	13.6
15	1	20,048	12.22
16	2	36,797	2.99
17	2	30,834	13.69
18	4	70,174	1.79
19	1	19,278	7.91
20	3	52,067	2.84
21	1	15,430	13.6
22	13	247,907	6.75
23	3	56,296	6.91
24	2	33,870	5.19
25	1	17,327	3.00
26	1	19,551	9.44
27	2	33,303	6.78
28	3	47,564	11.24
29	4	64,998	9.03
30	1	19,367	8.41
31	1	18,742	4.91
32	3	50,849	5.11
33	5	89,669	.39
34	1	19,661	10.05
35	2	31,650	11.41
36	1	17,466	2.22
37	2	35,217	1.41
38	2	31,686	11.31
39	2	37,430	4.76
40	2	31,641	11.43
41	3	55,500	3.57
42	2	38,249	7.05
43	1	15,213	14.83
44	1	18,990	6.39



The new Senate districts shown by the heavy lines and their numbers.

Dist.	No. Rep.	Tot. Pop.	Pct. of Var.
1	1	47,556	6.81
2	1	55,797	9.32
3	1	53,020	3.88
4	2	101,920	.14
5	1	51,395	.07
6	1	47,630	6.67
7	1	52,067	2.02
8	1	53,474	4.77
9	1	46,187	9.5
10	1	50,849	.36
11	1	51,927	1.74
12	1	58,041	13.72
13	1	49,518	8.13
14	1	46,884	8.13
15	1	49,529	2.95
16	1	52,793	3.44
17	1	47,312	7.29
18	5	267,531	4.83
19	1	51,184	.28
20	2	95,820	6.12
21	2	105,680	3.53
22	1	54,973	7.71
23	1	46,456	8.97
24	3	148,311	3.12
25	2	100,418	1.62

Senate

Arkansas Gazette.

LITTLE ROCK, THURSDAY, JULY 15, 1965.

State Apportioned Into 25 Senatorial, 44 House Districts

By RICHARD ALLIN
Of the Gazette Staff

The General Assembly was reapportioned Wednesday by the state Board of Apportionment acting under the order of federal District Court.

The Board divided the 75 counties into 44 House districts and 25 Senate districts. For the first time in Arkansas history some counties will have to share a representative with another. The number of Senate districts was reduced from 26.

Pulaski County is thrown with Perry County in the new 22d House district, which will have 13 representatives. It will be with Lonoke County in the 18th Senatorial district with five senators.

Pulaski County now has 11 representatives and Perry County one—Representative Paul Van Dalsem. Under the new plan, voters in both counties will cast votes on all 13 state representative positions, meaning that if Van Dalsem is a candidate he will be voted on by Pulaski County, too. There is no law that says all 13 can't be from Pulaski County.

Pulaski has three senators in the old 15th Senatorial District. Lonoke County shares two senators with Prairie, Woodruff and White County.

The vote on the House and Senate reapportionment plans was unanimous by Governor Faubus, the chairman, Secretary of State Kelly Bryant and Attorney General Bruce Bennett, members of the Board.

The new seating arrangement will be submitted today to the three-judge Federal District Court that ordered it done. Federal Judges Pat Mehaffy, J. Smith Henley and Gordon E. Young were sitting as the court of the Eastern District of Arkansas, Western Division, when they handed down their reapportionment order January 28.

In a petition to be filed in federal court, Attorney General Bennett asks that "If this court finds that this plan does not meet constitutional standards, the defendants hereby pray that this court will allow them to submit an alternate or alternate plans."

Governor Faubus also remarked that if the plan is unacceptable, he hoped that the court would provide some guidelines of what is and is not acceptable.

Governor Faubus Doesn't Like Plan

Although Governor Faubus voted for the plan, he condemned it after the vote was taken. When questioned, Faubus replied, "I don't like a bit of it. I think the plan is worse than the one we were operating under as far as representation of the people of the whole state is concerned."

Mr. Faubus said some of the districts were inequitably apportioned, but that when one error was corrected in the apportioning, another sprang up.

He said he was sure many persons would not like the plans. "If anyone anywhere wants to submit a better plan, I'd be glad to look it over," he said.

If anybody wants to criticize, he added, "I suggest that they cuss the United States Supreme Court."

Bennett agreed that in some cases some voters will be disenfranchised by the plan.

The plan will not go into effect until it has the approval of the federal court and is filed with the secretary of state.

The reapportionment plans were the joint work of Bryant, Bennett and Assistant Attorney General Farrell Faubus, the governor's son.

The reapportionment was ordered in a lawsuit against the Board of Apportionment by John Yancey of Little Rock. He charged that his rights were violated by the practice of having one representative for each of the 75 counties and apportioning the remaining 25 among the more populous counties. He also charged that the freezing of the 35 senators into 26 senatorial districts by Amendment 45 (adopted 1956) of the state Constitution was also violative of his rights.

Two 'Ideal' Figures Used as Guide Posts

The plans were adopted by the Board with two "ideal" figures in mind. Under the ideal, there would be one state representative for each 17,863 persons and one senator for each 51,036, based on the 1960 census.

But the ideal was not possible, so the Board adopted as a guideline a disparity of 15 per cent above and below the ideal.

The state Constitution required the Board to retain 100 House members and 35 senators.

The keystone of the reapportionment, as ordered by the United States Supreme Court, was "one man-one vote." The mean effect is to shift legislative influence to the more populous areas away from the rural areas.

In Arkansas the general effect is to shift the weight of representatives southward and eastward.

In counties with more than one representative, the representatives will run at large, unless changes are ordered by the federal court.

The alternative is to divide the state into 100 separate House districts (13 in Pulaski and Perry Counties), with voters of a district voting for only one representative).

The reapportionment plan changes the philosophy of representation under which Arkansas—and most other states—had heretofore operated when both houses were not apportioned strictly on population. In the past, population was not the sole consideration in Senate representation.

The Arkansas House of Representatives was last reapportioned in 1961 by the state Board of Apportionment, but their attempt to tamper as little as possible was overruled by the state Supreme Court, which submitted a plan of its own.

That apportionment contained the flaw that was cast out by the federal court. It started with the premise that each of the 75 counties should have at least one representative, with the remaining divided among more populous counties.

Van Dalsem Wanted Perry County With Pulaski; Believes He'll Win

By RICHARD ALLIN
Of the Gazette Staff

Representative Paul Van Dalsem said Thursday that Perry County was put in the same House district as Pulaski County in the reapportionment of the Arkansas legislature at his request.

And he scoffed at reports that his chances for re-election will be hurt by having to be voted on in Pulaski County as well as Perry County, which will comprise the new 22d District.

He expects to be one of the 13 state representatives elected from the two counties in the 1966 elections.

"I'll take my chances with these folks," Van Dalsem said of the Pulaski voters. "It was my request that Perry County be placed in with Pulaski. I believe they will elect me because of my qualifications."

Related Articles on Page 1B

Van Dalsem is the senior member of the legislature with 26 years of service—all for the state's smallest county, Perry (population 4,927).

His influence comes from:

1. His senior position on top committees, such as Rules and Education, and the Legislative Council;

2. His chairmanship for 16 years of the key Revenue and Taxation Committee;

3. Friendly relations with the administration;

Staff Photo
PAUL VAN DALSEM

4. Having the best knowledge of parliamentary procedure and maneuvering (this by his admission, and that of his colleagues);

5. Rarely missing a committee meeting, never a House session; having detailed knowledge of nearly all legislative measures regardless of importance;

6. Being a ruthless but dependable trader;

7. An ability to make a lot of noise effectively.

Van Dalsem likes to talk about his abilities with blustery amiability. He can be mean and bad - tempered, sometimes embarrassing in committee or in House sessions, but he doesn't mind being called names.

Perry County has been jokingly called the most over-represented county in Arkansas but there's truth in this. It is so small in population that it fails to meet the constitutional requirements to be a county—which is that it have a population of at least 5,000.

"Even my political enemies have never said I didn't represent the county from which I was elected," Van Dalsem said. He predicts his election

(See POLITICS on Page 2A.)

Politics

(Continued from Page 1)

in the Pulaski-Perry district for that reason.

He views the state's largest delegation as raw material in his hands.

"Can you even think what I could do with 13 votes behind me," he asked gleefully. "I could trade out the legislature."

He even imagines himself as a bridge between city and county. "With respect to the rural areas, I could get a co-operative group that would help Pulaski County."

Waving his hand broadly for effect, he said. "That's what I've got to offer Pulaski County. Even though there are a few folks in the House that don't like me, they respect me. They know I know more about state government than just about anybody.

"And a lot of people have called me an S.O.B. but no one ever called me a liar. "I can represent Pulaski County as well as Perry County. When something needs to be done I can do it."

Van Dalsem sees a common interest between the two counties, not the least of which is that "half the people in Perry County work in Pulaski County." And many of those, he says, have jobs courtesy of Paul Van Dalsem.

Van Dalsem sees another benefit in his election as one of the 22d District's 13 representatives:

"The law says that the Arkansas Legislative Council can have only one state representative from each county. By electing me, Pulaski County can have two members on the Council. It's the most important arm of the legislature."

And he sees himself with a quality needed by the new district: "Pulaski County needs a fighter."

Van Dalsem is a big man, with a big voice, who drives big cars, smokes big cigars and does not radiate false modesty.

"I like this kind of stuff," he says of his being in politics. It's a challenge to me. Something you like you do well."

Appendix F

ARKANSAS DEMOCRAT

Editorial Section—D
••• LITTLE ROCK, AUGUST 8, 1965

Backstage at the Capitol

Many Want Harris To Delay Resigning

By GEORGE DOUTHIT
Democrat Staff Writer

It isn't official, but some folks would like for Rep. Oren Harris to hang onto his congressional post long enough to avoid calling a special election to name his successor. There is a good reason—cost of campaigning.

Harris is slated to get a federal judgeship and resign from Congress.

The first man to mention that he would like to run for the job was Atty. Gen. Bruce Bennett. Since then, at least a dozen names have been mentioned as "being interested." Harris will have to resign from Congress before any election can be called. There is a good indication that it won't be until next spring.

"If Oren would just hang onto his job long enough to eliminate a special election, he would save a lot of people some money," we were told last week. So, we asked Bennett about it.

Six Elections Possible

Bennett said: "I don't think there will be a special election, at least for six months. Then I don't know what is going to happen. But a man running for the job could have to go through six elections.

"For instance, the Democrats could call a preferential primary and then a run-off primary to decide who was going to seek the job in a special election. Then if he wanted to keep his job, he would have to run in the regular primaries next July and August. After that he would have to run in the general election. That is six elections for one job. That's too many to try to finance."

Reapportionment Protests

Two protests have been filed against the way the State Board of Apportionment recently re-seated the 100-member House of Representatives. In both counties have arisen the fears that their candidates will be gobbled up by those coming from the larger counties.

Rep. Cecil Alexander of Cleburne County objects to having to run against candidates from much larger Faulkner County. The bar association of Crawford County thinks the same about being in the same House district with much larger Sebastian County.

Van Dalsem Not Objecting

What about Paul Van Dalsem? He hails from tiny Perry County and is going to run against candidates in Pulaski County. Van Dalsem not only isn't objecting, he helped to arrange it that way.

We fear that the charges set forth by Alexander and the Crawford County bar actually are setting out implications that Faulkner and Sebastian counties are "machine counties," meaning that whoever is "hand picked" by the machine leaders will get the job.

We do know that Sheriff Marlin Hawkins of Conway County didn't want his representative, Loid Sadler, running over in larger Faulkner County. We firmly believe that any candidate who has what it takes to get votes in his own county also can get votes in the adjoining counties.

Appendix G

Farrell Faubus Asks Judges to Approve Apportioning Plan

By JEROL GARRISON
Of the Gazette Staff

Assistant Attorney General Farrell Faubus told a three-judge federal court Friday that the state Board of Apportionment "conscientiously tried to observe constitutional standards" in reorganizing the districts of the Arkansas House and Senate to provide equal representation.

Faubus asked at a court hearing on the reapportionment plan that the judges approve the plan as submitted by the Board on July 15. The Board consists of Farrell's father, Governor Faubus, Secretary of State Kelly Bryant and Attorney General Bruce Bennett.

Three other lawyers objected to certain aspects of the plan for reapportioning the House of Representatives. They asked the Court to reject the House plan and send it back to the Board of Apportionment for revision.

The judges—Pat Mehaffy, J. Smith Henley and Gordon E. Young—listened to 30 minutes of arguments by the lawyers and then took both the House and Senate plans under advisement. The judges had ordered the reapportionment of both houses last January to comply with the United States Supreme Court's "one man, one vote" mandate.

The plan places the 100 representatives into 44 House districts and the 35 senators into 25 Senate districts. It abolishes the present system under which each of the 75 counties is entitled to at least one seat in the House regardless of its population.

John Yancey of Little Rock, who filed the lawsuit that resulted in the reapportionment order, was represented at the hearing by Thorp Thomas. The Crawford County Bar Association was represented by its president, Fines F. Batchel or Jr. of Van Buren, and Representatives Cecil L. Alexander of Cleburne County and Mack Evans of Van Buren County were represented by William B. Brady of Little Rock.

Evans intervened in the case Friday, adopting all of the pleadings previously filed by Alexander.

House Plan Target Of All Arguments

All of the lawyers directed their arguments at the house reapportionment plan. Thomas said the Board had proceeded on a "false premise" by assuming it could deviate 15 per cent above and 15 per cent below the ideal population figure in establishing each district.

"That actually gives you a mathematical spread of 30 per cent" Thomas said. He said the total spread should be no more than 15 per cent.

Thomas also argued that the state should be divided into 100 House districts with one representative per district. He interpreted Supreme Court rulings to mean that only one chamber—House or Senate—could have multimember districts.

To arrive at 100 districts with "strict neutrality where there can be no gerrymandering, no political considerations," Thomas suggested that the Board feed census information into an electronic computer.

Batchelor argued that the Board of Apportionment had placed too much emphasis on mathmatics by insisting that the population of every district be within 15 per cent of the ideal figure. He said the Supreme Court recognized that there would be instances in which it would be best to exceed this figure.

The people of Crawford County, Batchelor said, would like to be in a separate district, which would have a population 19 per cent above the ideal mark.

The reapportionment plan lumps Crawford (population 21,318) with Sebastian County (population 66,685) and gives the two-county district five representatives to be elected at large. Batchelor said that would deprive Crawford County of representation.

"It is a physical impossibility for less than 25 per cent of the people in a two-county district to elect any man," he said. Because we have 777 more people in Crawford County than the 15 per cent variance, the entire 21,318 are disenfranchised."

"I feel the Board of Apportionment has worried more about figures than about individuals," Batchelor argued.

Argument Repeated For Second Locale

Brady made the same type of argument in behalf of Cleburne and Van Buren Counties, which will be placed in the same House district with Faulkner County. He said the people of Cleburne and Van Buren Counties would be deprived of "meaningful representation," since the combined population of those counties (16,287) is dwarfed by Faulkner County's 24,303 population.

Brady noted that Conway County, with a population of 15,430, had been left in a separate district. He suggested that Conway and Faulkner Counties be placed in one district with two representatives and that Cleburne and Van Buren Counties be placed on one district with one representative.

"The [Arkansas] River Counties of Conway and Faulkner have a great similarity of interests and great community of interest that are not shared with the other counties [Cleburne and Van Buren]," Brady said.

He said the people of Cleburne and Van Buren Counties also have the same interests, among them the development of Greers Ferry Reservoir, which is located in both counties. He said the two counties are co-operating in a number of projects.

A district composed of Conway and Faulkner Counties and having two representatives would vary 11.2 per cent above the ideal population, and a Cleburne-Van Buren district with one representative would vary 8.8 per cent below the ideal. As a separate district, Conway County would be 13.6 per cent over - represented and the Faulkner-Cleburne-Van Buren district would be 13.6 per cent under-represented.

Should Few Faults Upset Entire Plan?

Judge Henley asked Brady this question: "Suppose the court finds the plan overall is not unreasonable except that in three or four or five cases the Board might have done better. Do you think the court ought to upset the plan and impose its judgment upon the Board with respect to those cases?"

Brady replied that it should. He said a three-judge court in another state liked the general tone of a reapportionment plan but sent it back to the appropriate state agency for improvements in certain areas.

Judge Henley then wanted to know what the three-judge court should consider in its ruling and what it should leave for review by the state Supreme Court.

"This court is only interested in the constitutional aspect [equal representation] of this case," Brady replied. "There are various other political elements that the state [Supreme Court] could consider and perhaps find the plan not acceptable, but the basic constitutional problem is the only one before this court."

Farrell Faubus disagreed with Batchelor and Brady that Crawford and Cleburne and Van Buren Counties would be deprived of representation. He said under the analogy of their argument a township within a county could claim that it was being deprived of representation.

"Just because a smaller county is put in with a larger one doesn't seem to me that they are automatically deprived of any representation," Faubus said. "They still have a certain number of votes."

Judge Asks Criteria For Grouping Counties

Judge Henley asked what criteria the Board had used in grouping the counties. Faubus said besides the 15 per cent maximum variation from the ideal population, the Board tried to create as many districts as possible.

"In other words, the Board stayed away from large groupings of counties where, say, five or six representatives would have to run over a very large area," Faubus said. "It tried to keep the district as small as possible."

Judge Mehaffy wanted to know why the Board placed Crawford and Sebastian Counties in the same district. Faubus said the Board felt that a 15 per cent variation above ideal population was as far as it could go and still meet constitutional standards. He said Crawford could have been grouped with Franklin County but that would have caused a population variance of 20 per cent in some other district.

"What was the problem then in connection with Van Buren, Cleburne, Faulkner and Conway Counties?" Judge Henley asked, recalling Brady's argument that it would be better to place Van Buren and Cleburne in one district and Faulkner and Conway in another.

Faubus sidestepped the question.

"It's the Board's contention," he replied, "that if any attack was to be made on any specific groupings of the plan it should have been made in the state Supreme Court . . . . It's our contention that this court must either find the plan constitutional or unconstitutional by constitutional standards and not as to the individual groupings."

Says Two Questions Are Before Court

Faubus said he thought the questions to be decided by the three-judge court were (1) whether multimember House districts are constitutional or whether the House must have 100 districts, and (2) the amount of variation that should be allowed from the ideal population.

Faubus said the 30-day period for petitioning the state Supreme Court to review the plan already had expired.

After the hearing, a newsman asked Faubus why the Board of Apportionment had placed Conway County in a separate district and Faulkner, Cleburne and Van Buren Counties in another one.

"The Board will have to tell you that," Faubus said. "The Board approved the plan."

The younger Faubus was the chief architect of the reapportionment plans for both the House and Senate. He said that except for "three or four minor changes" the plans that the Board submitted to the Court were the ones he prepared.

Faubus was asked whether the decision to place Conway County in a separate district was one of the changes made by the Board. "I'm not commenting on the changes," Faubus said.

Conway County is the political stronghold of Sheriff Marlin Hawkins, close ally of the Faubus administration.

Appendix H

Office-Supreme Court, U.S.
FILED
FEB 4 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Nos. 941 and 942
OCTOBER TERM, 1965

THE CRAWFORD COUNTY BAR ASSOCIATION, BY FINES F. BACHELOR, JR., PRESIDENT DAVID O. PARTAIN, VICE-PRESIDENT, and N. D. EDWARDS, SECRETARY-TREASURER ..... *Intervenors-Appellants*

and

CECIL L. ALEXANDER ..... *Intervenor-Appellant*

v.

ORVAL E. FAUBUS, GOVERNOR, KELLY BRYANT, SECRETARY OF STATE, and BRUCE BENNETT, ATTORNEY GENNERAL, BEING THE MEMBERS OF "THE BOARD OF APPORTIONMENT" OF THE STATE OF ARKANSAS ..... *Appellees*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

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PARAGON PRINTING CO., LITTLE ROCK

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the grounds that the questions are so insubstantial as to not warrant further review or consideration.

OPINION BELOW

Proper reference has been made by the appellants in their respective statements to the two unanimous opinions, one reported and the other yet unpublished, of the district court which are set out verbatim as appendices of appellants' statement in case number 941.

JURISDICTION

The jurisdictional aspects are adequately stated by appellants and are not challenged by appellees.

QUESTIONS PRESENTED

The sole question presented by the Motion to Affirm is: Does the plan of apportionment as prepared by the appellees, the Board of Apportionment, comport with and satisfy the objectives contained in the pronouncements of the United States Supreme Court requiring that both houses of a bi-cameral state legislature be apportioned, qualified by other relevant factors, so that each member of each house represents approximately the same number of people?

FEDERAL CONSTITUTIOAL QUESTIONS INVOLVED

This case concerns the application of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

ARKANSAS CONSTITUTIONAL PROVISION INVOLVED

Also involved in this litigation is Amendment 45 of the Constitution of Arkansas which is contained in appellants' statement No. 941 as Appendix G.

STATEMENT

These are direct appeals from a final judgment entered on November 4, 1965, by a three-judge district court convened pursuant to 28 U.S.C. §§2281 and 2284, approving the redistricting and apportioning of the Senate and House of the General Assembly of Arkansas by the appellees, the Board of Apportionment.

The statements found in the jurisdictional statement filed by appellants contain a fair resume of the circumstances which culminated in the judgment of the district court. However, some further amplification is deemed beneficial to give proper prospective.

This suit was originally instituted on July 15, 1964, by a hopeful candidate, John Yancey, seeking election to the State Senate. He challenged the constitutionality of Amendment 45 to the Constitution of Arkansas. This Amendment created the Board of Apportionment and provided in essence, for the distribution of representatives and senafors for various districts and counties to the General Assembly.

A statutory court of three judges was convened and after presentation of evidence, argument and briefs, unanimously found that Amendment 45 failed to satisfy the requisites of due process of law as taught by the Reapportionment Cases.[1] **Yancey v. Faubus**, 238 F. Supp. 290 (E.D. Ark. 1965).

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[1]This category, as used by the district court includes: **Reynolds v Sims**, 377 U.S. 533; **W.M.C.A., Inc. v. Lomanzo**, 377 U.S. 633; **Maryland Committee for Fair Elections v. Tawes**, 377 U.S. 656; **Davis v Mann**. 377 U.S. 678; **Roman v. Sincock**, 377 U.S. 695; **Lucas v. Forty Fourth Colorado General Assembly**, 377 U.S. 713 (1964).

During the interim, litigation was instigated in a state court to clarify the status of Amendment 45. **Faubus v. Kinney,** 239 Ark. 443, 389 S.W. 2d 887 (1965).

Thereafter the Board of Apportionment submitted to the district court a plan of combining the 75 counties of the state into 44 House districts and 25 Senatorial districts. The number of representatives and senators remained as 100 and 35, respectively. The house and senate positions were distributed to the designated areas. The plan of apportionment accompanies the opinion of the district court as Appendix A.

After the plan was filed with the district court the two separate appellants asked, and were granted leave, to intervene. Also joining the intervention was Mac Evans, a State Representative of Van Buren County.

Subsequently, after briefing and argument by the original parties and intervenors, the district court unanimously adopted the plan and ordered its implementation for the general election to be held during November, 1966. Notices of appeal were seasonably filed and this appeal perfected.

ARGUMENT

The appellants in Case No. 941 constitute the Crawford County Bar Association and the appellant in Case No. 942 is currently a member of the House of Representatives of the General Assembly from Cleburne County, Arkansas.

Both of the jurisdictional statements submitted to the court are directed at alleged deficiencies of the plan offered by the appellees and accepted by the district court. Each statement challenges the scheme created by appellees and suggests different alternatives which could have been incorporated by the board of apportionment and so improve the distribution of representatives for state government. While these alternate plans do appear to possess some merit, they are not endorsed by appellants as infallible and are not totally free from criticism. Indeed, the appellants in their motions candidly concede that the scheme adopted by the district court does satisfy much of the complaint aimed at the prior distribution of House and Senate districts discovered by the district court in its first opinion concerning this case. *Yancey* v. *Faubus, supra,* 238 F. Supp. 290 (E.D. Ark. 1964).

Apparently all of the parties agree that a mathematical equation is unworkable if other relevant factors such as terrain, density of population, economical aspects, and the like are to be given appropriate consideration. Even at best, pure computation of apportionment by a mathematical formula has overriding onerous falacies. Hence, no vigorous attack is made by the appellants based alone on disparity of population within certain districts. The appellants merely argue that a more realistic criteria could have been employed to improve and further minimize the disparity of representation.

The statement of appellant Alexander insists that the Board of Apportionment did not consider the compatibility of counties grouped into districts and offers that matters of political expedience were paramount. However, a survey of Alexander's statement does not survive scrutiny. Besides some vague reference of economic factors and geographical location the record is void of any bonafide evidence that either Cleburne or Van Buren Counties possess interest adverse to Faulkner County. To be sure, Faulkner County does have a significantly greater population than the total of Van Buren and Cleburne Counties. It is submitted that this factor alone does not demand the conclusion that a representative or representatives if elected from Faulkner County would work solely to the benefit of Faulkner County and not bear forth the interest of Van Buren or Cleburne Counties. If this proposition were meritorious, it could be rationally reduced to absurdity. The alderman does not represent only the interest of the block where he lives nor does the United States Senator restrict his efforts to his native county. The short answer to appellant's challenge is that there exists in law a strong presumption that public officials fairly discharge their official obligations.

It is trite and careless, without even a hint of supporting evidence to argue that appellees composing the Board of Apportionment did not discharge their official duties and give serious, proper, and due consideration to such material factors as economics, geography, similarity of interests and the like. A study of the results of their efforts discloses an abiding dedication of the Board to couple all of the significant aspects to effective districting. It may be more reasonably presumed that these relevant factors were objectives of the Board of Apportionment which remained foremost from the beginning of

their labors. Some genuine features are inevitably sacrificed. Often two ends sought to be achieved are discovered to be in conflict. This does not equate with sophisticated discrimination.

The suggestion that the appellee Board of Apportionment was prompted by political motives is also anemic. A vain effort to foster support for this contention is presented in the form of certain clippings from two Little Rock newspapers and a brief quotation from the Atlantic Monthly. The proper procedure to submit evidentary matters during the course of the hearing was ignored by appellants. Their neglect or failure to exercise this right effectively bars this tardy argument. In any event, it is remarkable that appellant would be so bold as to urge this court to review a plan of apportionment on the strength that might be gleamed from press clippings and extracts from periodicals.

Perhaps the most significant proof that the plan as designed by the appellees is workable and equitable is the fact that only representatives of two counties of a total of 75 counties in the State of Arkansas have appealed the approval of the plan. Viewed from another direction, only a little over 30,000 of the population of 1,786,000 have seen fit to complain of the appellees' efforts as approved by the district court. Of course, any such analyzation on behalf of appellees ignores common sense. Assuredly, not all of the people in Crawford and Cleburne Counties are dissatisfied with the reapportionment. It would be ridiculous to offer that the balance of the population of Arkansas are satisfied. But the absence of appellants is compelling and worthy of mention.

At this juncture, however, more thought can be directed at another facet of appellants' arguments. It is

contended that the districting plan will work to the detriment and dilute the voting force of certain minority groups. Note, however, that not one organized minority has raised objection. This fact may not be persuasive alone unless recognition is taken that complaint voiced by minorities in Arkansas is the rule rather than the exception.

It is imperative that comment be made concerning the contention that House and Senate Districts comprising more than one county are identical. This only appears to be true of the 14th House and Senate Districts which include Faulkner, Cleburne and Van Buren counties. Thus overlapping does occur save in one instance.

Finally, answer must be supplied to the address of multi-county, multi-member districts. As concluded by the district court, there is nothing unconstitutional in such an arrangement. Cf. *Fortson* v. *Dorsey*, 379 U.S. 433. In *Reynolds* v. *Simms*, 377 U.S. 533, it was stated:

> . . . it is constitutionally valid to use political sub-division lines in establishing state legislature districts, so long as the resulting apportionment is based substantially on population and the equal population principal is not diluted in any significant way.
>
> • • •
>
> . . . states may legitimately desire to maintain the integrity of various political sub-divisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to

> partisan gerrymandering. Single-member districts may be the rule in one state, while another state might desire to achieve some flexibility by creating multi-member or floterial districts.

Later, in *Fortson* v. *Dorsey, supra,* it was observed:

> It is not contended that there is not substantial equality of population among the fifty-four senatorial districts. The equal protection argument is focused solely upon the question of whether county-wide voting in the seven multi-district counties results in denying the resident therein a vote approximately equal in weight to that of voters resident in the single-member constituenties. Contrary to the District Court, we cannot say it does.

It appears, at least, that all authority discovered by appellees is contrary to the proposition urged by appellants.

CONCLUSION

This suit received great attention, thought and consideration as is reflected by the two thorough opinions of the district court. It is a suit of great magnitude and significance to the people of Arkansas.

The task of reapportionment was arduous. It was completed with reluctance but painstaking care. The plan is equitable and the decision of the district court is in concert with the pronouncements and teachings of this Court.

The appellees urged that the holding of the court below be affirmed.

Respectfully submitted,

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